

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOWN OF GREECE, NEW YORK, :

4 Petitioner : No. 12-696

5 v. :

6 SUSAN GALLOWAY, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, November 6, 2013

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

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16 Petitioner.

17 IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; for United
19 States, as amicus curiae, supporting Petitioner.

20 DOUGLAS LAYCOCK, ESQ., Charlottesville, Virginia; on
21 behalf of Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS G. HUNGAR, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	IAN H. GERSHENGORN, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioner	20
9	ORAL ARGUMENT OF	
10	DOUGLAS LAYCOCK, ESQ.	
11	On behalf of the Respondents	29
12	REBUTTAL ARGUMENT OF	
13	THOMAS G. HUNGAR, ESQ.	
14	On behalf of the Petitioner	57
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-696, the Town of
5 Greece v. Galloway.

6 Mr. Hungar.

7 ORAL ARGUMENT OF THOMAS G. HUNGAR

8 ON BEHALF OF THE PETITIONER

9 MR. HUNGAR: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The court of appeals correctly held that the
12 legislative prayers at issue in this case were not
13 offensive in the way identified as problematic in Marsh,
14 but the court then committed legal error by engrafting
15 the endorsement test onto Marsh as a new barrier to the
16 practice of legislative prayer.

17 JUSTICE KAGAN: Mr. Hungar, I'm wondering
18 what you would think of the following: Suppose that, as
19 we began this session of the Court, the Chief Justice
20 had called a minister up to the front of the courtroom,
21 facing the lawyers, maybe the parties, maybe the
22 spectators.

23 And the minister had asked everyone to stand
24 and to bow their heads in prayer and the minister said
25 the following -- he said, we acknowledge the saving

1 sacrifice of Jesus Christ on the cross. We draw
2 strength from his resurrection. Blessed are you who has
3 raised up the Lord Jesus. You who will raise us in our
4 turn and put us by his side. The members of the Court
5 who had stood responded amen, made the sign of the
6 cross, and the Chief Justice then called your case.

7 Would that be permissible?

8 MR. HUNGAR: I don't think so, Your Honor.
9 And, obviously, this case doesn't present that question
10 because what we have here is a case of legislative
11 prayer in the Marsh doctrine, which recognizes that the
12 history of this country, from its very foundations and
13 founding, recognize the propriety of legislative prayer
14 of the type that was conducted here.

15 JUSTICE GINSBURG: Well, the question --

16 JUSTICE KAGAN: The extension just between
17 the legislature and any other official proceeding; is
18 that correct?

19 MR. HUNGAR: Well, clearly, Marsh involves
20 legislative prayer, the tradition that we rely on
21 involves legislative prayer, and this case involves
22 legislative prayer. Whether -- what rule might apply in
23 other contexts would depend on the context.

24 JUSTICE KAGAN: Well, suppose I ask the
25 exact same question, same kinds of statements, same sort

1 of context, except it's not in a courtroom. Instead,
2 it's in a congressional hearing room.

3 Maybe it's a confirmation hearing, maybe
4 it's an investigatory hearing of some kind, and that a
5 person is sitting at a table in front of the members of
6 a committee, ready to testify, ready to give his
7 testimony in support of his nomination.

8 The minister says the exact same thing.

9 MR. HUNGAR: I think that's a -- that's a
10 closer question because of the congressional history,
11 but, of course, at least as far as I'm aware, they have
12 this history as it applies to the legislative body as a
13 whole, not to committees, but it would be a different
14 question.

15 One, obviously, important distinguishing
16 factor there, in addition to the fact that it's not the
17 legislative body as a whole --

18 JUSTICE SCALIA: We should -- we should --

19 MR. HUNGAR: -- is that people are compelled
20 to attend and testify under oath, which is a different
21 situation from the one here.

22 JUSTICE KAGAN: Well, why --

23 JUSTICE SCALIA: We should assume -- to --
24 to make it parallel to what occurred here, that the next
25 day, before the same committee, a Muslim would lead the

1 invocation and the day after that, an orthodox Jew. I
2 mean --

3 MR. HUNGAR: Yes, Your Honor.

4 JUSTICE SCALIA: -- it makes a difference
5 whether it's just one -- one denomination that is being
6 used as -- as chaplain or open to various denominations.

7 MR. HUNGAR: That's correct, Your Honor.
8 That's why we believe this case is actually an easier
9 case than Marsh because, in Marsh, there was a paid
10 chaplain from the same denomination for 16 years.

11 JUSTICE GINSBURG: But the question,
12 Mr. Hungar --

13 JUSTICE KAGAN: Suppose you are correct,
14 Mr. Hungar, for 11 years, the prayers sounded almost
15 exclusively like the ones that I read, and one year, on
16 four occasions, there was some attempts to vary it up,
17 to have a Baha'i minister or a -- a Wiccan, but for the
18 most part, not out of any malice or anything like that,
19 but because this is what the people in this community
20 knew and were familiar with and what most of the
21 ministers were, most of the prayers sounded like this?

22 MR. HUNGAR: Well, no. I mean, it's clearly
23 not correct that most of the prayers sounded like the
24 one you just read. Most of the prayer that --

25 JUSTICE GINSBURG: But your position is that

1 wouldn't matter, as I understand, because you have --
2 you have -- you have two limitations, proselytizing and
3 disparaging. And -- but I think Justice Kagan's
4 question gets at -- at place -- place limitations.

5 One could read your brief and say, well, it
6 doesn't matter; it could be an executive body, it could
7 be a court, it could be a town meeting, a school board,
8 a zoning board, a utilities board. That's -- is this
9 case about prayer at the beginning of a legislative
10 session, or is it about prayer in all three branches of
11 government?

12 MR. HUNGAR: This case is about prayer at
13 the beginning of a legislative session. That's exactly
14 what the meetings at issue here are -- are about.
15 That's what the board of the Town of Greece is. In
16 fact, Respondents try to argue that this is somehow what
17 they call coercive because there are public hearings
18 that are held.

19 But the public hearings are held at least
20 30 minutes after the prayer, and anyone coming for the
21 purpose of the public hearing can easily show up after
22 the prayer, if they don't want to be there.

23 JUSTICE KENNEDY: Why -- why was it that you
24 so promptly answered Justice Kagan's question to the
25 effect that this would be a violation? What -- why

1 would there be a violation in the instance she put?

2 MR. HUNGAR: I'm sorry. Which instance,
3 Your Honor?

4 JUSTICE KENNEDY: The first question Justice
5 Kagan asked you, the hypothetical about the prayer in
6 this Court. You seemed readily to agree that that would
7 be a First Amendment violation. Why?

8 MR. HUNGAR: Well, perhaps I conceded too
9 much, but I think the important distinction is between
10 the -- both the judicial context and the legislative
11 context, on the one hand, and the -- the absence of a --
12 of a comparable history that shows that it did not --

13 JUSTICE KENNEDY: Well, is it -- is it
14 simply history that makes -- there's no rational
15 explanation? It's just a historical aberration?

16 MR. HUNGAR: No, it's not -- it's not a
17 question of historical aberration. It's a question
18 of --

19 JUSTICE KENNEDY: Well, what's -- what's the
20 justification for the distinction?

21 MR. HUNGAR: It's a question of what the
22 Establishment Clause has understood, both at the time
23 and throughout history, to forbid and not to forbid.
24 The judiciary is different than a legislature.
25 Legislatures can be partisan, the judiciary should not

1 be. People are compelled to testify under oath.

2 JUSTICE SCALIA: But you -- but you -- you
3 had no problem, Mr. Hungar, with the marshal's
4 announcement at the -- at the beginning of this session.
5 "God save the United States and this Honorable Court."
6 There -- there are many people who don't believe in God.

7 MR. HUNGAR: That's correct, Your Honor.
8 And clearly --

9 JUSTICE SCALIA: So that's okay?

10 MR. HUNGAR: Yes.

11 JUSTICE SCALIA: Why -- why is that okay?

12 MR. HUNGAR: Whether -- if -- perhaps I
13 misunderstood the hypothetical. If the hypothetical is,
14 as you described, with a different minister, with --
15 with an open process, a nondiscriminatory process like
16 the one we have here, I think it would be a much closer
17 case than this one, but it might be constitutional.

18 But whether that case is constitutional or
19 not, this case is far from the constitutional line --
20 further from the constitutional line than the State
21 legislature's practice in Marsh because, there, Nebraska
22 had one chaplain from one denomination for 16 years, and
23 yet, that was constitutionally permissible.

24 And his prayers were not distinguishable in
25 content from the prayers at issue here during the time

1 that was relevant to the case.

2 CHIEF JUSTICE ROBERTS: Would it make a
3 difference in your analysis if instead of, as I
4 understand the hypothetical, there was a point of
5 saying, all rise, or something of that sort?

6 Would it make a difference if the
7 hypothetical Justice Kagan posed were the same, except
8 people weren't told to rise or invited to rise or, in
9 fact, were told to stay seated, something like that, so
10 there would be no indication of who was participating in
11 the prayer?

12 Is that a -- is that a ground of distinction
13 that you're willing to accept or not?

14 MR. HUNGAR: I don't think that is
15 constitutionally significant, unless -- I mean, it might
16 be different if people are compelled to stand, but
17 whether they are or not -- I mean, in the Marsh case
18 itself, Senator Chambers testified that the practice in
19 the Nebraska legislature was for people to stand.

20 And he felt coerced to stand because when he
21 was there -- he tried to avoid it -- but when he was
22 there, he felt he needed to stand because everybody else
23 was doing it, and he needed to have dealings with these
24 people as a fellow legislator.

25 The Court, nonetheless, held that he's an

1 adult, and he -- he is expected to be able to disagree
2 with things that he disagrees with, and that is not a
3 constitutional violation.

4 CHIEF JUSTICE ROBERTS: I wonder how far you
5 can carry the -- your historical argument and whether
6 some of these things are properly regarded as more
7 historical artifacts, right? I mean, our motto is, "In
8 God we trust," right? That's the motto. It's been that
9 for a long time, right?

10 MR. HUNGAR: Yes, sir.

11 CHIEF JUSTICE ROBERTS: But wouldn't we look
12 at it differently if there were -- suddenly, if there
13 were a proposal today, for the first time, to say let's
14 adopt a motto, "In God we trust"? Would we view that
15 the same way, simply because it's -- in other words, the
16 history doesn't make it clear that a particular practice
17 is okay going on in the future.

18 It means, well, this is what they've done --
19 they have done, so we're not going to go back and
20 revisit it, just like we're not going to go back and
21 take the cross out of every city seal that's been there
22 since -- you know, 1800. But it doesn't mean that it
23 would be okay to adopt a seal today that would have a
24 cross in it, does it?

25 MR. HUNGAR: Not necessarily. But -- but I

1 think history is clearly important to the Establishment
2 Clause analysis under this Court's precedents in two
3 significant respects, both of which apply here, one of
4 which might not apply in your -- with respect to your
5 hypothetical.

6 The first being the history shows us that
7 the practice of legislative prayer, just like the motto,
8 has not, in fact, led to an establishment, and,
9 therefore, we can be confident it is not in danger of
10 doing so. And, secondly, the history of legislative
11 prayer, unlike your hypothetical, goes back to the very
12 framing of the First Amendment.

13 The fact that -- and this is what the Court
14 said in Marsh -- the fact that at the very time the
15 first Congress was writing and sending the -- the First
16 Amendment out to the States to be ratified, they adopted
17 the practice of having a congressional chaplain. And
18 the congressional chaplain -- the record -- the
19 historical record is clear -- gave prayers that were
20 almost exclusively sectarian, as Respondents define that
21 word.

22 JUSTICE SCALIA: I don't really understand
23 your -- your answer. How can it be that, if the
24 practice existed in the past, it was constitutional?
25 Was it constitutional in the past?

1 MR. HUNGAR: Yes, Your Honor.

2 JUSTICE SCALIA: If it was constitutional in
3 the past, why -- why would it be unconstitutional if the
4 same thing is done today, even without any past parallel
5 practice? That's a nice alliteration.

6 MR. HUNGAR: I'm --

7 JUSTICE SCALIA: Is past parallel practice
8 essential?

9 MR. HUNGAR: I think this Court's precedents
10 have also indicated, at least in some cases, that if --
11 if a practice is constitutional, as we know it to be the
12 case because of the fact that it has been understood to
13 be constitutional and consistent with our religion
14 clauses from the founding, other practices that have no
15 greater impact, no greater tendency to establish
16 religion, are equally constitutional.

17 And we believe that is an
18 appropriate doctrine.

19 JUSTICE GINSBURG: Is there -- is there any
20 constitutional historical practice with respect to this
21 hybrid body? It's not simply a legislature. It has a
22 number of administrative functions. Sometimes, it
23 convenes as a town meeting. Sometimes, it entertains
24 zoning applications.

25 Is there a history for that kind of hybrid

1 body, as there is for the kind of legislature we had in
2 Nebraska or our Congress?

3 MR. HUNGAR: Yes, Your Honor, in two
4 respects. First of all, the Becket Fund amicus brief
5 identifies various examples of -- of municipal
6 government prayer over the course of our founding, which
7 is -- over the course of our history, which is not
8 surprising given this -- the legislative practice at the
9 State and Federal level as well.

10 And, secondly, Congress for much of its --
11 much of our history entertained private bills, which
12 would be the equivalent in terms of legislative or
13 non-purely legislative functions you're talking about,
14 with what the -- the Town of Greece does here.

15 JUSTICE KENNEDY: Well, if we had a -- if we
16 had a series of cases, what -- what is a -- a utility
17 rate-making board would come to the Supreme Court. We
18 say, well, it's enough like a legislative that it's like
19 Marsh. But I don't think the public would understand
20 that.

21 MR. HUNGAR: Well, Your Honor, whatever --
22 whatever line might be drawn between non-legislative
23 bodies and legislative bodies, what we are talking about
24 here is a legislative meeting of a legislative body, and
25 it would be -- it would be incongruous, as this Court

1 said in Marsh, if Congress could have legislative
2 prayers and the States couldn't. It would be equally
3 incongruous --

4 JUSTICE KENNEDY: Well, the essence of the
5 argument is we've always done it this way, which has
6 some -- some force to it. But it seems to me that your
7 argument begins and ends there.

8 MR. HUNGAR: No, Your Honor. I mean, as
9 we -- as we said in our brief, the principles that
10 undergird the Establishment Clause are equally
11 consistent with the position we're advancing here.

12 As the -- as your opinion in the County of
13 Allegheny case indicates, the fundamental -- the core of
14 Establishment Clause concern is coercion or conduct that
15 is so extreme that it leads to the establishment of a
16 religion because it is putting the government squarely
17 behind one faith to the exclusion of others, and that's
18 clearly not -- not what's going on here.

19 JUSTICE ALITO: May I ask you about the
20 individual plaintiffs here? And what do we know about
21 them? They, obviously, have appeared at proceedings,
22 and they object to the proceedings. Does the record
23 show that they had matters before the town council
24 during the hearings part of the proceeding?

25 MR. HUNGAR: No, Your Honor. There is --

1 there's no evidence of that. There's no -- the
2 Respondents have no standing to assert the interests of
3 children or police officers or award recipients or -- or
4 permit applicants.

5 They don't even claim to be in -- in any of
6 those categories.

7 JUSTICE ALITO: Well, what about the public
8 forum part? They did speak, occasionally, then; isn't
9 that right?

10 MR. HUNGAR: Yes, Your Honor.

11 JUSTICE ALITO: Do we know what they spoke
12 about?

13 MR. HUNGAR: Well, on at least one occasion,
14 one of them spoke about the prayer -- or on one or two
15 occasions and then, on multiple occasions, spoke about a
16 cable access channel issue.

17 JUSTICE ALITO: And what did they -- what
18 was the issue there?

19 MR. HUNGAR: Something about -- she was
20 expressing vehement disagreement with the town's
21 decision to award a cable access channel to one entity,
22 as opposed to another.

23 JUSTICE BREYER: Do you have any objection
24 to -- to doing one thing that was suggested in the
25 circuit court opinion, which is to publicize rather

1 thoroughly in -- in the area that those who were not
2 Christians, and perhaps not even religious, are also
3 welcome to appear and to have either a prayer or the
4 equivalent, if they're not religious?

5 Do you have an objection to that?

6 MR. HUNGAR: Certainly not. There'd be --

7 JUSTICE BREYER: Well, then -- then there --
8 is there a disagreement on that point because certainly,
9 that was one of the concerns. It wasn't on anyone's
10 website. There are -- Greece is a small town very near
11 Rochester, and there are, at least in Rochester, lots of
12 people of different religions, including quite a few of
13 no religion.

14 So -- so could you work that out, do you
15 think, if that were the only objecting point?

16 MR. HUNGAR: I -- I don't know what the
17 town's position would be on that, but it -- certainly,
18 there would be no constitutional problem with doing
19 that. I mean, here, as a practical matter, since --

20 JUSTICE BREYER: No, no. I'm not saying
21 it's a constitutional problem I got from the opinion of
22 doing the opposite, of -- of not making an effort to
23 make people who are not Christian feel, although they
24 live near in or near the town or are affected thereby,
25 participants, over time.

1 MR. HUNGAR: But, Your Honor, it's a
2 perfectly rational approach when -- when any legislative
3 body is going to have a practice of legislative prayer,
4 to go to the houses of worship in the community. And --

5 JUSTICE BREYER: I'm not saying it's not. I
6 want to know if you have any objection. I --

7 MR. HUNGAR: Well, I certainly don't think
8 it is constitutionally required, although I would note
9 that as a practical matter that has happened here in
10 2007 --

11 JUSTICE BREYER: Do you -- would you have --
12 if all that were left in the case were the question of
13 you're making a good-faith effort to try to include
14 others, would you object to doing it?

15 MR. HUNGAR: I don't know what the town's
16 position is on that. As I said, as a practical matter,
17 that has already happened here. The town deputy
18 supervisor was quoted in the newspaper saying, anyone
19 can come in prayer, anyone can --

20 JUSTICE BREYER: Yes. That's different from
21 putting it on a website. That's different from making
22 an organized effort to see that people get the word.

23 MR. HUNGAR: As I say --

24 JUSTICE SCALIA: Mr. Hungar, what -- what is
25 the equivalent of prayer for somebody who is not

1 religious?

2 MR. HUNGAR: I would --

3 JUSTICE SCALIA: What would somebody who is
4 not religious --

5 MR. HUNGAR: In the Rubin --

6 JUSTICE SCALIA: -- what is the equivalent
7 of prayer?

8 MR. HUNGAR: It would be some invocation of
9 guidance and wisdom from --

10 JUSTICE SCALIA: From what?

11 MR. HUNGAR: I don't know. In -- in the
12 Rubin case --

13 (Laughter.)

14 MR. HUNGAR: In the Rubin case, a
15 nonreligious person delivered invocations on multiple
16 occasions.

17 JUSTICE SCALIA: I suppose a moment --

18 JUSTICE BREYER: Perhaps he's asking me that
19 question, and I can answer it later.

20 (Laughter.)

21 MR. HUNGAR: I'd like to reserve the
22 remainder of my time.

23 CHIEF JUSTICE ROBERTS: Yes. Thank you,
24 counsel.

25 Mr. Gershengorn.

1 ARGUMENT OF IAN H. GERSHENGORN,
2 FOR UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. GERSHENGORN: Mr. Chief Justice, and may
5 it please the Court:

6 The Second Circuit's decision here requires
7 courts to determine when a legislature has permitted too
8 many sectarian references in its prayers or has invited
9 too many Christian prayer-givers. That approach is
10 flawed for two reasons.

11 First, it cannot be squared with our
12 nation's long history of opening legislative sessions,
13 not only with a prayer, but a prayer given in the
14 prayer-giver's own religion idiom. And, second, it
15 invites exactly the sort of parsing of prayer that Marsh
16 sought to avoid and that Federal courts are ill-equipped
17 to handle --

18 JUSTICE SOTOMAYOR: And what was the purpose
19 of Marsh saying that proselytizing or damning another
20 religion would be a constitutional violation?

21 MR. GERSHENGORN: So we agree with --

22 JUSTICE SOTOMAYOR: So, unless you parse the
23 prayers, you can't determine whether there's
24 proselytizing or damnation. That is Judge Wilkinson's
25 point when he was faced with this question, which is you

1 have to -- to do some parsing.

2 MR. GERSHENGORN: So, Your Honor, you have
3 to look at -- at the prayer to determine proselytizing.
4 But it's a very different series of judgments, we
5 submit, than determining whether something is sectarian.
6 The kinds of debates we're having, I think, are
7 reflected in the differences --

8 JUSTICE SOTOMAYOR: Now, seriously,
9 counselor. You can't argue that the quote that Justice
10 Kagan read is not sectarian. It invokes Jesus Christ as
11 the savior of the world. There are many religions who
12 don't believe that. Let's get past that.

13 MR. GERSHENGORN: So, Your Honor --

14 JUSTICE SOTOMAYOR: This is sectarian.

15 MR. GERSHENGORN: We agree that these are
16 sectarian. But the kinds of debates that you're seeing
17 among the parties, whether, for example, 15 percent, 50
18 percent, 60 percent of the congressional prayers are
19 sectarian. Those are debates about whether "Holy
20 Spirit" is sectarian. A court -- a district court has
21 held that "Allah" is not sectarian.

22 JUSTICE SOTOMAYOR: So let's talk about the
23 context instead of prayer. If the Chief Justice got up
24 at the beginning of this session and said, "All rise for
25 a prayer," would you sit down?

1 MR. GERSHENGORN: Your Honor, whether I
2 would sit or not, we don't think that that would be
3 constitutional --

4 JUSTICE SOTOMAYOR: Do you think -- how many
5 people in this room do you think would sit, talking
6 truthfully?

7 MR. GERSHENGORN: I don't think -- I don't
8 think many would sit, Your Honor.

9 JUSTICE SOTOMAYOR: All right.

10 M R. GERSHENGORN: But we don't think that
11 that --

12 JUSTICE SOTOMAYOR: So why do you think that
13 someone who is sitting in a small room where hearings of
14 this nature are being held, when the guy who's about --
15 the chairman of this legislative body, is about to rule
16 on an application you're bringing to him or her, why do
17 you think any of those people wouldn't feel coerced to
18 stand?

19 MR. GERSHENGORN: So, Your Honor, I'd like
20 to address the coercion point this way: With respect to
21 town councils, it's our view that, as a general matter,
22 that the municipal legislatures can invoke the same
23 tradition of solemnizing and invoking divine guidance as
24 Federal and State legislatures.

25 We recognize there are differences, however,

1 and Your Honor has pointed to one, and that's the --
2 what was called the public forum here. And we think
3 it's very -- because those are the ones where the -- is
4 adjudicated license applications -- liquor applications.

5 And we do think it is important on this
6 record that those are separated in time. It's at the
7 court of appeals Appendix 929 and 1120. So that the
8 meeting starts at 6:00, which is when the prayer -- when
9 the prayer is, but the board meetings to adjudicate
10 those types of issues are at 6:30 or 6:32.

11 And so the type of concern that Your Honor
12 has raised is not presented on this record, and we think
13 that's significant. We think some of the other
14 factors --

15 JUSTICE KAGAN: Mr. Gershengorn, do you
16 think that if the legislature -- excuse me -- if the
17 town board here just -- you know, started it off with a
18 prayer and then kept on going, do you think that that
19 would be a significantly different case and you would
20 switch sides?

21 MR. GERSHENGORN: I don't know that we would
22 switch sides, Your Honor. But I do think it mitigates
23 the coercion that the -- that the Respondents have
24 identified. And we think it -- that that is one of the
25 significant differences between the town, the -- the

1 town legislature and a -- and the legislature --

2 JUSTICE SCALIA: You agree that coercion is
3 the test, however?

4 MR. GERSHENGORN: We don't agree that
5 coercion is the test, Your Honor.

6 JUSTICE SCALIA: If it is the test --

7 MR. GERSHENGORN: We think it's the
8 history -- we think the history is the -- the principal
9 guidance of Marsh is -- we think there are three pillars
10 in Marsh. First of all, that the history is what the
11 Court looks to first. And here, there was a long
12 history of legislative prayer.

13 Second, that the Court should be very wary
14 of parsing prayer to make sectarian judgments. And,
15 third, what Marsh said is that adults are less
16 susceptible to religious doctrine -- indoctrination and
17 peer pressure. And we think --

18 JUSTICE KAGAN: Mr. Gershengorn, could you
19 respond to this? Here's what our -- our country
20 promises, our Constitution promises, It's that, however
21 we worship, we're all equal and full citizens. And I
22 think we can all agree on that.

23 And that means that, when we approach the
24 government, when we petition the government, we do so
25 not as a Christian, not as a Jew, not as a Muslim, not

1 as a nonbeliever, only as an American.

2 And what troubles me about this case is
3 that, here, a citizen is going to a local community
4 board, supposed to be the closest, the most responsive
5 institution of government that exists, and is
6 immediately being asked -- being forced to identify
7 whether she believes in the things that most of the
8 people in the room believe in, whether she belongs to
9 the same religious team as most of the people in the
10 room do.

11 And it strikes me that that might be
12 inconsistent with this understanding that, when we
13 relate to our government, we all do so as Americans and
14 not as Jews and not as Christians and not as
15 nonbelievers.

16 MR. GERSHENGORN: So, Justice Kagan, I think
17 we agree with much of what you say. But -- but with the
18 difference here is that this approaching of the
19 government body occurs against the backdrop of 240 years
20 of history, which makes this different.

21 From the very beginning of our legislature,
22 from the first Continental Congress and then from the --
23 from the first Congress, there have been legislative
24 prayers given in the religious idiom of either the
25 official chaplain or a guest chaplain, that have

1 regularly invoked the -- the deity and the -- the
2 language of the prayer-giver.

3 And that --

4 JUSTICE GINSBURG: Mr. Gershengorn, your --
5 your brief is the one who brought up -- and you were
6 quite candid about it -- the hybrid nature of that body.
7 I think it's on pages 22 to 24 of your brief. And you
8 say it would be proper to have certain checks in that
9 setting. So, for one, make sure that the entrance and
10 the exit is easy. For another, inform the people in
11 town of the tradition, so they won't be confused.

12 But you recognize, on the one hand, that this
13 isn't like Congress or the Nebraska legislature, and
14 then you say these would be nice things to do. Are you
15 saying just that it would be good and proper? Or are
16 you saying it would be necessary, given the hybrid
17 nature of this body?

18 MR. GERSHENGORN: So, Your Honor, with
19 respect to some of the things we identify, which are
20 similar to the ones that Justice Breyer recommended, I
21 think our view is they're more akin to safe harbors,
22 that there are, undoubtedly, advancement challenges that
23 could be brought. And to the extent that the town can
24 point to things, such as -- such as public criteria and
25 things like that, that is helpful.

1 With respect to the -- the public forum
2 aspect, I don't think we have a position as to whether
3 it is required, but we do think that that makes this
4 case the much easier case because of that separation of
5 the one part that is the strongest argument for the
6 other side, that there is an element of coercion, that
7 your application is -- is being ruled on, that the
8 separation the town has adopted makes that much less
9 persuasive.

10 We think the other elements that the
11 Respondents have pointed to for coercion are ones that
12 trouble us because they are things that have analogs in
13 our history. So, for example, they point to the
14 presence of children. But, of course, on the Senate
15 floor are the Senate pages, who are all high school
16 juniors.

17 And as the reply brief points out, there are
18 often children in the galleries at State legislatures
19 being acknowledged. And so some of those -- those
20 elements that the Respondents have pointed to for
21 coercion, we think are not ones that the Court should --
22 should adopt.

23 JUSTICE KENNEDY: Of course, your -- your
24 test is whether or not -- part of your test -- is
25 whether or not it advances religion. If you ask a

1 chaplain for the State assembly in Sacramento,
2 California, who's going to go to the assembly to deliver
3 a prayer, are you going to advance your religion today,
4 would he say, oh, no?

5 MR. GERSHENGORN: So, Your Honor, I think
6 it's a much narrower test. What this Court said in
7 Marsh was that the limit on legislative prayers is --
8 does it proselytize, advance, or denigrate any one
9 religion?

10 We think, with respect to the content of the
11 prayer, that the Second Circuit got it just about right,
12 that the question is does it preach conversion, does it
13 threaten damnation to nonbelievers, does it belittle a
14 particular --

15 JUSTICE KENNEDY: So -- so you -- you use
16 the word "advance" only as modified by "proselytize"?

17 MR. GERSHENGORN: What Marsh said was
18 "proselytize, advance, or denigrate."

19 JUSTICE KENNEDY: Because that's -- that's
20 not what your -- your brief says, "does not proselytize
21 or advance."

22 MR. GERSHENGORN: That -- that's the
23 language from Marsh, Your Honor, is to proselytize or --
24 "proselytize, advance, or denigrate."

25 JUSTICE KENNEDY: But that's that the test

1 you want us to adopt and --

2 MR. GERSHENGORN: It is, Your Honor.

3 JUSTICE KENNEDY: -- I'm asking whether or
4 not it is, in fact, honest and candid and fair to ask
5 the minister or -- or the priest or the chaplain or the
6 rabbi if, by appearing there, he or she seeks to advance
7 their religion?

8 MR. GERSHENGORN: So, Your Honor, I don't
9 think that's what Marsh meant by advance --

10 JUSTICE KENNEDY: If not, I'm not quite sure
11 why they're there.

12 MR. GERSHENGORN: You're not quite sure why
13 "advance" is there -- or why the rabbi is there.

14 We don't think that the mere presence of the
15 rabbi -- that's what Marsh held, that Marsh -- what
16 Marsh says is "advance" does not mean having a single --
17 a single chaplain -- a chaplain of a single denomination
18 or looking at the content of the sectarian prayer, in
19 light of that history.

20 Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Laycock.

23 ORAL ARGUMENT OF DOUGLAS LAYCOCK

24 ON BEHALF OF THE RESPONDENTS

25 MR. LAYCOCK: Mr. Chief Justice, and may it

1 please the Court:

2 Petitioner's answer to Justice Kagan's
3 opening question is entirely formalistic. There is no
4 separation in time between the public hearing and the
5 invocation. People appear before this town board to ask
6 for personal and specific things.

7 Our clients put shows on the cable channel.
8 They were concerned the cable channel was about to be
9 abolished or made much less usable. People appear to
10 ask for a group home, parents of a Down syndrome child.
11 There are many personal petitions presented at this --
12 in the immediate wake of the prayer.

13 JUSTICE ALITO: But that's during
14 the public -- that's during the public forum part.

15 MR. LAYCOCK: That's in the public forum.

16 JUSTICE ALITO: Which is not really -- it's
17 not the same thing as the hearing.

18 MR. LAYCOCK: It's not the same thing as the
19 hearing, and that's the point, Your Honor.

20 JUSTICE ALITO: There's another -- there's
21 another part of the proceeding that is the hearing.

22 MR. LAYCOCK: Yes.

23 JUSTICE ALITO: And that's when somebody has
24 a specific proposal. They want to -- something
25 specifically before the board, and they want relief.

1 They want a variance.

2 MR. LAYCOCK: The -- the hearing is a
3 particular kind of proposal. The hearing --

4 JUSTICE ALITO: And that is separated in
5 time.

6 MR. LAYCOCK: That is -- that is somewhat
7 separated in time. The forum is not. And people make
8 quite personal proposals there. They ask for board
9 action. They often get board action.

10 JUSTICE ALITO: But that is a legislative
11 body at that point. It's clearly a legislative body, is
12 it not? The only -- the difference is it's a town
13 rather than -- than Congress or a State legislature,
14 where you have more formalized procedures. This is --
15 this is more direct democracy. Or it's like a -- it's a
16 town meeting.

17 MR. LAYCOCK: It is -- it is direct
18 democracy. When a citizen appears and says, solve the
19 traffic problem at my corner, solve this nuisance family
20 that commits a lot of crimes in my block, that's not
21 asking for legislation or policymaking. That's asking
22 for administrative action. This board has legislative,
23 administrative, and executive functions.

24 JUSTICE ALITO: Well, if that is your
25 argument, then you are really saying you can never have

1 prayer at a town meeting.

2 MR. LAYCOCK: That's -- that's not what
3 we're saying. We're saying --

4 JUSTICE ALITO: How could you do it?
5 Because that's the kind of thing that always comes up at
6 town meetings.

7 MR. LAYCOCK: We're saying you cannot have
8 sectarian prayer. The town should instruct -- should
9 have a policy in the first place, which it doesn't,
10 instruct the chaplains, keep your prayer nonsectarian,
11 do not address points of --

12 JUSTICE ALITO: All right. Give me an
13 example -- give me an example of a prayer that would be
14 acceptable to Christians, Jews, Muslims, Buddhists,
15 Hindus. Give me an example of a prayer. Wiccans,
16 Baha'i.

17 CHIEF JUSTICE ROBERTS: And -- and atheists.

18 JUSTICE SCALIA: And atheists. Throw in
19 atheists, too.

20 (Laughter.)

21 MR. LAYCOCK: We -- we take Marsh to -- to
22 imply that atheists cannot get full relief in this
23 context, and the McCreary dissenters said that
24 explicitly. So points on which believers are known to
25 disagree is a -- is a set that's in the American

1 context, the American civil religion, the
2 Judeo-Christian tradition --

3 JUSTICE ALITO: Well, give me an example
4 then. I think the point about atheists is a good point.
5 But exclude them for present purposes, and give me an
6 example of a prayer that is acceptable to all of the
7 groups that I mentioned.

8 MR. LAYCOCK: About a third of the prayers
9 in this record, Your Honor, are acceptable.

10 JUSTICE ALITO: Give me an example.

11 MR. LAYCOCK: Can I have the joint appendix?
12 The prayers to the almighty, prayers to the
13 creator.

14 JUSTICE ALITO: To "the almighty."

15 MR. LAYCOCK: Yes.

16 JUSTICE ALITO: So if -- if a particular
17 religion believes in more than one god, that's
18 acceptable to them?

19 MR. LAYCOCK: Well, some religions that
20 believe in more than one god believe that all their many
21 gods are manifestations of the one god. But the true
22 polytheists, I think, are also excluded from the
23 McCreary dissent.

24 JUSTICE SCALIA: What about devil
25 worshippers?

1 (Laughter.)

2 MR. LAYCOCK: Well, if devil worshippers
3 believe the devil is the almighty, they might be okay,
4 but they're probably out --

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Who is going to make
7 this determination? Is it -- is it an ex ante
8 determination? You have to review the proposed prayer?

9 MR. LAYCOCK: I'm just flipping through.
10 There are a number of examples, but if you look at page
11 74a of the joint appendix, the prayer from August 13,
12 2003 -- no, I'm sorry. That ends, "in Christ's name."

13 But there are -- the count was about, about
14 two-thirds, one-third, So there are plenty of them in
15 here.

16 JUSTICE ALITO: 74a, "Heavenly father,"
17 that's acceptable to all religions?

18 MR. LAYCOCK: "Heavenly Father" is very
19 broadly acceptable. And -- you know, the test cannot be
20 unanimity because that's impossible, right? That's why
21 the atheists are -- that's why the atheists are
22 excluded.

23 I'm sorry, Justice Scalia. Would you repeat
24 your question?

25 CHIEF JUSTICE ROBERTS: Well, I'll repeat

1 mine.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: It was, who was
4 supposed to make these determinations? Is there
5 supposed to be an officer of the town council that will
6 review -- do prayers have to be reviewed for his
7 approval in advance?

8 MR. LAYCOCK: No. Principally, the clergy
9 make the -- make this determination. There is a
10 200-year tradition of this kind of civic prayer. The
11 clergy know how to do it. If the city has a policy,
12 then an occasional violation by one clergy is not the
13 city's responsibility.

14 So -- so this is left, principally, to the
15 clergy by simply giving them instructions. They receive
16 no instruction of any kind about the purpose of this
17 prayer or --

18 CHIEF JUSTICE ROBERTS: So there is an
19 official in the town council that is to instruct clergy
20 about what kind of prayer they can say?

21 MR. LAYCOCK: That's right. 37 State
22 legislative bodies, the House of Representatives have
23 these kinds of guidelines. They issue them to the guest
24 clergy before they appear.

25 JUSTICE KENNEDY: And if I'm -- if I'm that

1 official and I think a prayer was over the top for being
2 proselytizing and particularly sectarian, I would say I
3 rather not -- you not come back next week; I am going to
4 look for somebody else?

5 MR. LAYCOCK: Well, you might have a
6 conversation with him first and --

7 JUSTICE KENNEDY: Well, so in other words,
8 the government is now editing the content of prayers?

9 MR. LAYCOCK: Editing the content of
10 government-sponsored prayers. Of course, these clergy
11 can pray any way they want, on their own time, with
12 their own audience. But this is an official government
13 event. And it's part of the board's meeting. It's
14 sponsored by the government.

15 And they delegate the task to these clergy,
16 and they can define the scope of that --

17 JUSTICE SCALIA: Your point is that it
18 coerces -- it's bad because it coerces?

19 MR. LAYCOCK: It coerces the people who are
20 about to stand up and ask for things from the board
21 and --

22 JUSTICE SCALIA: If there is -- if coercion
23 is the test of the Free Exercise Clause, why do we need
24 a Free Exercise Clause? If there's coercion -- I'm
25 sorry -- of the Establishment Clause, why do we need the

1 Establishment Clause? If there's coercion, I assume it
2 would violate the Free Exercise Clause, wouldn't it?

3 MR. LAYCOCK: Well, I think that's right.
4 And that's why --

5 JUSTICE SCALIA: So it seems to me very
6 unlikely that the test for the Establishment Clause is
7 identical to the test for the Free Exercise Clause.

8 MR. LAYCOCK: Well, it seems to me unlikely
9 as well. Coercion is one test for the Establishment
10 Clause, but there is also broad agreement on the Court,
11 and there has been, that sectarian endorsements are
12 prohibited by the Establishment Clause.

13 CHIEF JUSTICE ROBERTS: What exactly --
14 since you are adopting the coercion test, what exactly
15 is coercive in this environment? Having to sit and
16 listen to the prayer?

17 MR. LAYCOCK: Well, there are many coercive
18 aspects here of varying degrees of importance. Citizens
19 are asked to participate, to join in the prayer.
20 They're often asked to --

21 CHIEF JUSTICE ROBERTS: They are asked to
22 participate, and -- but not in any tangible way. They
23 say, well, I'm not going to participate. And
24 everybody's just sitting there.

25 MR. LAYCOCK: They are often asked to

1 physically participate, to stand or to bow their heads.
2 The testimony is most of the citizens bow -- most of the
3 citizens bow their heads, whether they are asked to or
4 not.

5 So people who are not participating are
6 immediately visible. The pastors typically say, "Please
7 join me in prayer." They offer the prayer on behalf of
8 everyone there. They talk about "our Christian faith."

9 JUSTICE SCALIA: This is coercion? He
10 says -- you know, he says, "May we pray," and somebody
11 doesn't want to pray, so he stays seated.

12 MR. LAYCOCK: What -- what's coercive about
13 it is it is impossible not to participate without
14 attracting attention to yourself, and moments later, you
15 stand up to ask for a group home for your Down Syndrome
16 child or for continued use of the public access channel,
17 or whatever your petition is, having just, so far as you
18 can tell, irritated the people that you were trying to
19 persuade.

20 JUSTICE ALITO: Let me give you an example
21 of a practice that's a little bit different. Maybe
22 you'll say it's a lot different from what the Town of
23 Greece does.

24 First of all, this town starts out by
25 making -- by proceeding in a more systematic and

1 comprehensive way in recruiting chaplains for the month
2 or whatever it is. So, instead of just looking to all
3 the houses of worship within the town, it identifies
4 places of worship that may be outside the town
5 boundaries that people within the town who adhere to a
6 minority religion may attend.

7 And it makes it clear that it's open to
8 chaplains of any religious -- of any religion on a
9 rotating basis. And then they have -- they structure
10 their proceedings so that you have the prayer, and then
11 the legislative part of the town meeting.

12 And then there's a clear separation in time
13 and access between that part of the proceeding and the
14 hearing where variances and things of that nature are
15 held.

16 Now, you would still say that's
17 unconstitutional because you have to add on that a
18 prayer that is acceptable to everybody; is that it? Is
19 there any other problem with what I've just outlined?

20 MR. LAYCOCK: Well, if the separation in
21 time really works, that's part of the remedy that we've
22 suggested that is possible here. We still believe that
23 prayers should be nonsectarian.

24 JUSTICE GINSBURG: On the remedy, this case
25 was remanded by the Second Circuit for the parties,

1 together with the court, to work out appropriate relief.
2 And if you could tell us what you think that relief
3 would be because, then, that is a measure of the
4 constitutional infraction.

5 So what would -- you put yourself before the
6 district judge and propose the changes that you think
7 would be necessary to bring this practice within the
8 constitutional boundary.

9 MR. LAYCOCK: Well, we think the town has to
10 have a policy.

11 CHIEF JUSTICE ROBERTS: Well, just to be
12 clear, are you talking about what would be satisfactory
13 to the Second Circuit or satisfactory to you? Because
14 you don't accept the Second Circuit's approach.

15 MR. LAYCOCK: Well, we've tried to sort out
16 the totality of the circumstances to -- to make it
17 clearer --

18 JUSTICE GINSBURG: What my question was --

19 MR. LAYCOCK: I'm talking about what would
20 be --

21 JUSTICE GINSBURG: -- your theory, and you
22 say existing situation violates the Constitution. So
23 what changes do you think would need to be made --

24 MR. LAYCOCK: We think --

25 JUSTICE GINSBURG: -- that would bring this

1 within the constitutional boundary?

2 MR. LAYCOCK: We think the town needs a
3 policy. The policy should give guidelines to chaplains
4 that say, stay away from points in which believers are
5 known to disagree. And we think the town should do what
6 it can to ameliorate coercion. It should tell the
7 clergy, don't ask people to physically participate.
8 That's the most important thing.

9 The government suggests disclaimers might help.
10 We think that's right. The government suggests
11 separating the prayer a bit more in time. Some States
12 put their prayer before the call to order. The prayer
13 could even be five minutes before the beginning of the
14 meeting.

15 The coercion can't be entirely eliminated,
16 but the gratuitous coercion, the things that are done
17 that don't have to be done in order to have a prayer,
18 could be eliminated. And we think those two pieces are
19 the components of a remedy.

20 JUSTICE SCALIA: Mr. Laycock, it seems to me
21 that you're missing here is -- and this is what
22 distinguishes legislative prayer from other kinds -- the
23 people who are on the town board or the representatives
24 who are in Congress, they're citizens. They are there
25 as citizens.

1 The judges here are not -- we're not here as
2 citizens. And as citizens, they bring, they bring to
3 their job all of -- all of the predispositions that
4 citizens have.

5 And these people perhaps invoke the deity at
6 meals. They should not be able to invoke it before they
7 undertake a serious governmental task such as enacting
8 laws or ordinances?

9 There -- there is a serious religious
10 interest on the other side of this thing that -- that --
11 that people who have religious beliefs ought to be able
12 to invoke the deity when they are acting as citizens,
13 and not -- not as judges or as experts in -- in the
14 executive branch.

15 And it seems to me that, when they do that,
16 so long as all groups are allowed to be in, there seems
17 to me -- it seems to me an imposition upon them to -- to
18 stifle the manner in which they -- they invoke their
19 deity.

20 MR. LAYCOCK: We haven't said they can't
21 invoke the deity or have a prayer, and they can
22 certainly pray any way they want silently or just before
23 the meeting.

24 We've said they cannot impose sectarian
25 prayer on the citizenry, and that is very different from

1 what Congress does, it is very different from what this
2 Court does. Maybe the closest analogy is legislative
3 committee hearings where the citizens interact. We
4 don't have a tradition of prayer there.

5 What -- what -- what the town board is doing
6 here is very different from anything in the tradition
7 that they appeal to.

8 JUSTICE BREYER: Are you -- I would like you
9 to take into account an aspect of this. I mean, in my
10 own opinion, I don't know of anyone else's, I'm not
11 talking for others. But one -- a major purpose of the
12 religion clauses is to allow people in this country of
13 different religion, including those of no religion, to
14 live harmoniously together.

15 Now, given that basic purpose, what do we do
16 about the problem of prayer in these kinds of
17 legislative sessions? One possibility is say, you just
18 can't do it, it's secular. But that is not our
19 tradition.

20 MR. LAYCOCK: That's correct.

21 JUSTICE BREYER: All right. The second
22 possibility is the one that you are advocating. And it
23 has much to recommend it, try to keep
24 non-denominational, try to keep it as inoffensive to the
25 others as possible. That's the upside.

1 The downside is seeing supervised by a
2 judge, dozens of groups, and today, there are 60 or 70
3 groups of different religions coming in and saying, no,
4 that doesn't work for us, this doesn't work for us, and
5 that's the nightmare that they are afraid of.

6 I mean, even in this town or in the area,
7 there are significant numbers, as well as Christians, of
8 Jews, of Muslims, of Baha'is, of Hindus, and others.

9 All right. So there's a third approach, and
10 that is say, well, you can't have them if there's any
11 aspect of coercion. But we just saw people walking into
12 this room, "God save the United States," and you want to
13 win your case. I didn't see people sitting down.

14 All right. Then the fourth approach, which
15 is the other that has -- makes its appearance here, is
16 to say let's try to be inclusive. Now, was enough -- in
17 other words, so you didn't get the right prayer today,
18 but you -- and even with the nonreligious, you know many
19 believe in the better angels of our nature and the
20 spiritual side of humankind; it's not impossible to
21 appeal to them. So you say, you'll have your chance.

22 And that's the thing I -- I would like you
23 to explore. I mean, is there a way of doing that, or is
24 that preferable to the other ways, or do we get into
25 trouble?

1 MR. LAYCOCK: We think that rotation does
2 not work. First of all, because -- for several reasons,
3 but most citizens come for a single issue to one or two
4 meetings. They get the prayer they get that night.
5 They don't benefit from the rotation scheme.

6 Any rotation scheme will be dominated by the
7 local majority, maybe even disproportionate to its
8 numbers. Religious minorities -- unfamiliar minorities
9 give the prayer. There are often political protests;
10 there are often threats and hate mail. They don't want
11 to give the prayer. And many city councils won't stand
12 up to the political pressure and enable those people to
13 give the prayer. So there are multiple reasons why
14 rotation does not solve the problem here.

15 We think nonsectarianism has a very long
16 tradition. The government is not a competent judge of
17 religious truth, Madison said, that was not a
18 controversial proposition in the founding.

19 And even in the first Congress, in the
20 prayers they point to, there were no prayers there that
21 violate our principle, invoking details in which
22 believers disagree because, then, 98-1/2 percent of the
23 population was Protestant, Christ was not yet a point
24 that disbelievers disagreed.

25 JUSTICE ALITO: Well, that gets exactly to

1 the -- that gets exactly to the problem with your
2 argument about nonsectarian prayer. Yes, when -- at the
3 beginning of the country, the population was
4 98 percent-plus Protestant. Then it became
5 predominantly Christian. Then it became predominant --
6 almost exclusively Christian and Jewish.

7 And it -- but now, it's not that -- it's --
8 it's gone much further than that. So we have a very
9 religiously diverse country. There are a lot of
10 Muslims, there are a lot of Hindus, there are Buddhists,
11 there are Baha'is, there are all sorts of other
12 adherents to all sorts of other religions.

13 And they all should be treated equally,
14 and -- but I don't -- I just don't see how it is
15 possible to compose anything that you could call a
16 prayer that is acceptable to all of these groups.

17 MR. LAYCOCK: We --

18 JUSTICE ALITO: And you haven't given me an
19 example.

20 MR. LAYCOCK: We -- we cannot treat -- I'm
21 not a pastor -- we cannot treat everybody -- literally
22 everybody equally without eliminating prayer altogether.
23 We can treat the great majority of the people equally
24 with the tradition of prayer to the almighty, the
25 governor of the universe, the creator of the world --

1 JUSTICE SCALIA: You want to pick the groups
2 we're going to exclude?

3 MR. LAYCOCK: I think you picked them, Your
4 Honor.

5 JUSTICE SCALIA: The Baha'i, who else?
6 These -- these groups are too small to --

7 CHIEF JUSTICE ROBERTS: We've already
8 excluded the atheists, right?

9 JUSTICE SCALIA: Yeah, the atheists are out
10 already. Yes.

11 MR. LAYCOCK: We've excluded the atheists.
12 I don't think the Baha'i are excluded, but I'm not
13 certain.

14 JUSTICE SCALIA: Okay. So who else? I
15 mean, you suggest -- you say just the vast majority is
16 all that we have to cater to.

17 MR. LAYCOCK: Well, I -- I think the -- the
18 atheists are inevitably excluded. We can't help --

19 JUSTICE SCALIA: Okay. Good. Got that.
20 Number 1, atheists. Who else?

21 MR. LAYCOCK: True -- true polytheists who
22 don't understand their gods as manifestations of the one
23 god are probably excluded. I'm not sure many others
24 are.

25 And you have all these lawyerly

1 hypotheticals, but the fact is we've done this kind of
2 prayer in this country for 200 years. There's a long
3 tradition of civic prayer, and the clergy know how to do
4 it. But in Greece, no one has told them that's what we
5 want you to do.

6 And -- and I would say the one time the
7 country in a major way got involved in
8 government-sponsored, sectarian prayers that people
9 disagreed about was when we imposed Protestant religious
10 exercises on Catholic children in the 19th century. And
11 that produced mob violence, church burnings, and people
12 dead in the streets.

13 JUSTICE KAGAN: Mr. --

14 CHIEF JUSTICE ROBERTS: We've already
15 separated out, I thought, in our jurisprudence, children
16 and adults.

17 MR. LAYCOCK: Well, Lee v. Weisman twice
18 reserves the question of whether adults might be subject
19 to similar pressures.

20 CHIEF JUSTICE ROBERTS: Well, you do accept
21 the fact that children may be subject to subtle coercion
22 in a way that adults are not, right?

23 MR. LAYCOCK: In some ways that adults are
24 not, but there's -- there's no doubt that before you
25 stand up to ask for relief from a governing body, you

1 don't want to offend that body. Adults are subject to
2 coercion here. And -- and no competent attorney would
3 tell his client, it doesn't matter whether you visibly
4 dissent from the prayer or not. You try to have your
5 client make a good impression.

6 JUSTICE KENNEDY: Well, I just want to make
7 sure what your position -- your position is that town
8 councils like Greece can have prayers if they are
9 non-provocative, modest, decent, quiet,
10 non-proselytizing. That's your position?

11 MR. LAYCOCK: I wouldn't use all those
12 adjectives, but, yes. And -- and we don't think that's
13 difficult to do.

14 JUSTICE KAGAN: Mr. --

15 JUSTICE BREYER: Well, Congress has a set of
16 guidelines which you've read and are here in the papers
17 and so forth. Are those satisfactory to you?

18 MR. LAYCOCK: We'd like to be a little more
19 explicit, but those are vastly better than --

20 JUSTICE BREYER: If those are satisfactory
21 to you, then I wonder, are they satisfactory to
22 everyone? And -- and you will find all kinds of
23 different beliefs and thoughts in this country, and
24 there will be people who say, but I cannot give such a
25 prayer if I am a priest in that particular -- or a

1 minister or whatever in that particular religion. I
2 must refer to the God -- to God as I know that God by
3 name. And what do we do with them?

4 That's what -- I mean, we can recommend it,
5 but can we say that the Constitution of the United
6 States requires it?

7 MR. LAYCOCK: You know, there are such
8 people, and I respect that, and they should not be
9 giving government prayers. They're taking on a
10 government function when they agree to give the
11 invocation for the town board.

12 JUSTICE KAGAN: Mr. Laycock --

13 JUSTICE SCALIA: Well, that's -- that's --
14 that's really part of the issue, whether they're
15 undertaking a government function or whether they're
16 acting as citizens in a legislative body, representative
17 of the people who bring -- who bring to that their --
18 their own personal beliefs.

19 I think the average person who -- who -- who
20 participates in a legislative prayer does not think that
21 this is a governmental function. It's a personal
22 function. And -- and that's why we separate out the
23 legislative prayer from other kinds of prayers.

24 MR. LAYCOCK: They're -- they're not praying
25 for their congregation. They are -- they are invited by

1 the board, the prayer-giver is selected by the board,
2 the board decides to have the prayer, the board gives
3 this one person and only one person time on the agenda
4 to pray. This is clearly governmental as you held in
5 Santa Fe --

6 JUSTICE SCALIA: If you had an atheist
7 board, you would not have any prayer.

8 MR. LAYCOCK: Precisely.

9 JUSTICE SCALIA: I guarantee you because it
10 is a personal prayer that the members of the legislature
11 desire to make.

12 JUSTICE SOTOMAYOR: Counsel, assuming that
13 we don't --

14 JUSTICE KAGAN: Mr. Laycock, would you --

15 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

16 JUSTICE SOTOMAYOR: Assuming -- you hear the
17 resistance of some members of the Court to sitting as
18 arbiters of what's sectarian and nonsectarian, and I
19 join some skepticism as to knowing exactly where to join
20 that line.

21 Assuming you accept that, what would be the
22 test that you would proffer, taking out your preferred
23 announcement that this prayer has to be nonsectarian?

24 MR. LAYCOCK: Well, the test that we have
25 proffered is the test from the McCreary dissent, points

1 on which believers are known to disagree, so you don't
2 have to be a theologian. Points on which people are
3 commonly known to disagree, and the Fourth Circuit has
4 had no difficulty administering this rule. The cases
5 that come to it are clearly sectarian or clearly
6 nonsectarian --

7 JUSTICE KENNEDY: It just seems to me that
8 enforcing that standard and the standard I suggested
9 involves the State very heavily in the censorship and --
10 and the approval or disapproval of prayers.

11 MR. LAYCOCK: But it's not censorship when
12 it's the governmental --

13 JUSTICE KENNEDY: That may play, ultimately,
14 in your position if we say that that's why there
15 shouldn't be any prayer at all. But then you have the
16 problem mentioned by Justice Scalia that we are
17 misrepresenting who we really are.

18 MR. LAYCOCK: If you really believe
19 government can't draw lines here, then your alternatives
20 are either prohibit the prayer entirely or permit
21 absolutely anything, including the prayer at the end of
22 our brief, where they ask for a show of hands, how many
23 of you believe in prayer? How many of you feel
24 personally in need of prayer? If there are no limits,
25 you can't draw lines.

1 JUSTICE SCALIA: That's not a prayer.

2 That's not a prayer.

3 MR. LAYCOCK: Well, it was how --

4 JUSTICE SCALIA: "How many of you have been
5 saved?" That's not a prayer.

6 MR. LAYCOCK: It was how he introduced his
7 prayer, and if you can't draw lines, I don't know why he
8 can't say that.

9 JUSTICE KAGAN: Mr. Laycock, sort of, all
10 hypotheticals aside, isn't the question mostly here, in
11 most communities, whether the kind of language that I
12 began with, which refers repeatedly to Jesus Christ,
13 which is language that is accepted and admired and
14 incredibly important to the majority members of a
15 community, but is not accepted by a minority, whether
16 that language will be allowed in a public town session
17 like this one.

18 That's really the question, isn't it?

19 MR. LAYCOCK: That's the issue that actually
20 arises in the case.

21 JUSTICE KAGAN: That's the issue that
22 actually arises. Here's what -- I don't think that this
23 is an easy question. I think it's hard, because of
24 this: I think it's hard because the Court lays down
25 these rules, and everybody thinks that the Court is

1 being hostile to religion, and people get unhappy and
2 angry and agitated in various kinds of ways. This goes
3 back to what Justice Breyer suggested.

4 Part of what we are trying to do here is to
5 maintain a multi-religious society in a peaceful and
6 harmonious way. And every time the Court gets involved
7 in things like this, it seems to make the problem worse
8 rather than better. What do you think?

9 MR. LAYCOCK: Well, I don't -- I don't think
10 that's true. I mean, there are people who distort your
11 decisions. There are people who misunderstand your
12 decisions honestly and -- and innocently. But keeping
13 government neutral as between religions has not been a
14 controversial proposition in this Court. And I don't
15 think the Fourth Circuit has made it worse.

16 They've got a workable rule, and the prayers
17 are no longer exclusively Christian prayers in the
18 Fourth Circuit, and they have been able to mostly
19 enforce that, and there hasn't been litigation at the
20 margins because all the prayers were clearly --

21 JUSTICE BREYER: Suppose you did this: You
22 combined your two approaches. The town has to -- it
23 cannot -- it must make a good-faith effort to appeal to
24 other religions who are in that area. And then you have
25 these words from the House, the chaplain should keep in

1 mind that the House of Representatives -- or you would
2 say whatever relative group -- is comprised of members
3 of many different faith traditions, period, end of
4 matter.

5 Is that sufficient, those two things?

6 MR. LAYCOCK: That would help immensely. We
7 think some of the clergy need more detailed explanation
8 of what that means, but, yes, that would help immensely.

9 JUSTICE KENNEDY: Should we write that in a
10 concurring opinion?

11 (Laughter.)

12 JUSTICE KENNEDY: I mean, I'm serious about
13 this. This -- this involves government very heavily in
14 religion.

15 MR. LAYCOCK: Well, government became very
16 heavily involved in religion when we decided there could
17 be prayers at open legislative sessions. Marsh is the
18 source of government involvement in religion. And, now,
19 the question is how to manage the problems that arise
20 from that.

21 JUSTICE ALITO: Well, Marsh is not the
22 source of government involvement religion in this
23 respect. The first Congress is the source.

24 MR. LAYCOCK: Fair enough. Fair enough.
25 The tradition to which Marsh points.

1 JUSTICE ALITO: The first Congress that also
2 adopted the First Amendment.

3 MR. LAYCOCK: That -- that's correct, and
4 that had prayers that did not address predestination or
5 having to accept Jesus as your savior or any other point
6 on which listeners disagree.

7 JUSTICE ALITO: Many of them -- many of them
8 were very explicitly Christian, were they not?

9 MR. LAYCOCK: They were very explicitly
10 Christian, but that was not a point of disagreement at
11 the time. They stayed away from any -- any issue that
12 Protestants disagreed on.

13 JUSTICE KENNEDY: In a way, it sounds quite
14 elitist to say, well, now, we can do this in Washington
15 and Sacramento and Austin, Texas, but you people up
16 there in Greece can't do that.

17 MR. LAYCOCK: Well, it's not that the people
18 in Greece can't do it. It's just that this board is
19 functioning in a fundamentally different way from what
20 Congress or the State legislature functions. And
21 also --

22 JUSTICE ALITO: My -- my understanding is
23 that the first chaplain of the Senate was the Episcopal
24 bishop of New York; isn't that correct? And he used to
25 read -- he took his prayers from the Book of Common

1 Prayer. Was that acceptable to Baptists at the time,
2 Quakers?

3 MR. LAYCOCK: Well, it wouldn't have been
4 their choice. But did he talk about the choice between
5 bishops and presbyters and congregations as a way of
6 governing the church? They have not offered a single
7 example of a prayer in the founding era that addressed
8 points on which Protestants were known to disagree.

9 And I don't think there is one. The
10 founding generation kept government out of religious
11 disagreements. And what has changed is not the
12 principle. What has changed is that we have a wider
13 range of religious disagreements today.

14 If there are no further questions, we ask
15 you to affirm.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Laycock.

18 Mr. Hungar, you have 3 minutes remaining.

19 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

20 ON BEHALF OF THE PETITIONER

21 MR. HUNGAR: Thank you, Mr. Chief Justice.

22 First, I would like to correct one factual
23 misimpression -- the assertion that only non-Christian
24 prayer-givers delivered the prayer after 2008. It's not
25 in the record, but the official web site of the Town of

1 Greece shows that at least four non-Christian
2 prayer-givers delivered prayers thereafter in 2009, '10,
3 '11, and '13.

4 On the sectarian points, clearly, the
5 line --

6 JUSTICE SOTOMAYOR: Counsel --

7 MR. HUNGAR: I'm sorry?

8 JUSTICE SOTOMAYOR: One a year?

9 MR. HUNGAR: I'm sorry, Your Honor?

10 JUSTICE SOTOMAYOR: Four additional people
11 after the suit was filed?

12 MR. HUNGAR: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: One a year?

14 MR. HUNGAR: Approximately.

15 JUSTICE SOTOMAYOR: How often does the
16 legislature meet?

17 MR. HUNGAR: Once a month.

18 And on the sectarian line, I just like to
19 point the Court to the Senate brief -- the amicus brief
20 filed by Senators, pages 8 to 17, which shows the
21 extensive history from the beginning of the Republic
22 until today of prayer in Congress. That would be
23 sectarian and unconstitutional under Respondents'
24 position.

25 With respect to coercion, it's

1 unquestionably true that there is less -- less basis for
2 claiming coercion here than there was in Marsh.

3 In Marsh, Senator Chambers was required to
4 be on the Senate floor by rule, he had to be there to do
5 his job, and the practice was to stand every single
6 time, which he did because he felt coerced to do it;
7 whereas, here, the record suggests that there were three
8 times when somebody requested people to stand out of 121
9 occasions. The idea that this is more coercive than
10 Marsh is absurd.

11 In Marsh, the Court expressly rejected a
12 coercion argument saying, "We expect adults to be able
13 to deal with this."

14 And, with respect to the history, as well, I
15 think the debate in the Continental Congress, when this
16 issue was first raised, shows what the American
17 tradition has been; that is, Americans are not bigots,
18 and we can stand to hear a prayer delivered in a
19 legislative forum by someone whose views we do not agree
20 with. That is the tradition in this country, and that's
21 why it doesn't violate the Establishment Clause.

22 And, finally, with respect to the fact that
23 this is a municipality, rather than a state or local --
24 or Federal government, that can't possibly make a
25 difference as an Establishment Clause matter.

1 It makes no sense to suggest that the --
2 that a prayer at the local level is more dangerous for
3 Establishment Clause purposes than what Congress is
4 doing. Only Congress could establish a religion for the
5 entire nation, which is the core preventive purpose of
6 the Establishment Clause. To suggest that there are
7 greater restrictions on municipalities makes no sense at
8 all.

9 We think that the dangerously overbroad
10 theories advanced by Respondents are at odds with our
11 history and traditions, which we reflect this tradition
12 of tolerance for religious views that we don't agree
13 with in the legislative context.

14 Respondents' theories also conflict with the
15 religion clauses mandate, that it's not the business of
16 government to be regulating the content of -- of prayer
17 and -- and regulating theological orthodoxy.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

A				
aberration 8:15	administrative 13:22 31:22,23	allegheeny 15:13	appearing 29:6	assembly 28:1,2
8:17	admired 53:13	alliteration 13:5	appears 31:18	assert 16:2
able 11:1 42:6	adopt 11:14,23	allow 43:12	appendix 23:7	assertion 57:23
42:11 54:18	27:22 29:1	allowed 42:16	33:11 34:11	assume 5:23
59:12	adopted 12:16	53:16	applicants 16:4	37:1
abolished 30:9	27:8 56:2	almighty 33:12	application	assuming 51:12
aboveentitled	adopting 37:14	33:14 34:3	22:16 27:7	51:16,21
1:11 60:22	adult 11:1	46:24	applications	atheist 51:6
absence 8:11	adults 24:15	alternatives	13:24 23:4,4	atheists 32:17
absolutely 52:21	48:16,18,22,23	52:19	applies 5:12	32:18,19,22
absurd 59:10	49:1 59:12	altogether 46:22	apply 4:22 12:3	33:4 34:21,21
accept 10:13	advance 28:3,8	ameliorate 41:6	12:4	47:8,9,11,18
40:14 48:20	28:16,18,21,24	amen 4:5	approach 18:2	47:20
51:21 56:5	29:6,9,13,16	amendment 8:7	20:9 24:23	attempts 6:16
acceptable	35:7	american 25:1	40:14 44:9,14	attend 5:20 39:6
32:14 33:6,9	advanced 60:10	32:25 33:1	approaches	attention 38:14
33:18 34:17,19	advancement	59:16	54:22	attorney 49:2
39:18 46:16	26:22	americans 25:13	approaching	attracting 38:14
57:1	advances 27:25	59:17	25:18	audience 36:12
accepted 53:13	advancing 15:11	amicus 1:19 2:7	appropriate	august 34:11
53:15	advocating	14:4 20:2	13:18 40:1	austin 56:15
access 16:16,21	43:22	58:19	approval 35:7	average 50:19
38:16 39:13	affirm 57:15	analogs 27:12	52:10	avoid 10:21
account 43:9	afraid 44:5	analogy 43:2	approximately	20:16
acknowledge	agenda 51:3	analysis 10:3	58:14	award 16:3,21
3:25	agitated 54:2	12:2	arbiters 51:18	aware 5:11
acknowledged	agree 8:6 20:21	angels 44:19	54:24	
27:19	21:15 24:2,4	angry 54:2	argue 7:16 21:9	back 11:19,20
acting 42:12	24:22 25:17	announcement	argument 1:12	12:11 36:3
50:16	50:10 59:19	9:4 51:23	2:2,5,9,12 3:3	54:3
action 31:9,9,22	60:12	answer 12:23	3:7 11:5 15:5,7	backdrop 25:19
add 39:17	agreement	19:19 30:2	20:1 27:5	bad 36:18
addition 5:16	37:10	answered 7:24	29:23 31:25	bahai 6:17 32:16
additional 58:10	akin 26:21	ante 34:7	46:2 57:19	47:5,12
address 22:20	al 1:6	anyones 17:9	59:12	bahais 44:8
32:11 56:4	alito 15:19 16:7	appeal 43:7	arises 53:20,22	46:11
addressed 57:7	16:11,17 30:13	44:21 54:23	artifacts 11:7	baptists 57:1
adhere 39:5	30:16,20,23	appeals 3:11	aside 53:10	barrier 3:15
adherents 46:12	31:4,10,24	23:7	asked 3:23 8:5	basic 43:15
adjectives 49:12	32:4,12 33:3	appear 17:3	25:6 37:19,20	basis 39:9 59:1
adjudicate 23:9	33:10,14,16	30:5,9 35:24	37:21,25 38:3	becket 14:4
adjudicated	34:16 38:20	appearance	asking 19:18	began 3:19
23:4	45:25 46:18	44:15	29:3 31:21,21	53:12
administering	55:21 56:1,7	appearances	aspect 27:2 43:9	beginning 7:9
52:4	56:22	1:14	44:11	7:13 9:4 21:24
	allah 21:21	appeared 15:21	aspects 37:18	25:21 41:13
				B
				back 11:19,20
				12:11 36:3
				54:3
				backdrop 25:19
				bad 36:18
				bahai 6:17 32:16
				47:5,12
				bahais 44:8
				46:11
				baptists 57:1
				barrier 3:15
				basic 43:15

<p>46:3 58:21 begins 15:7 behalf 1:15,21 2:4,11,14 3:8 29:24 38:7 57:20 beliefs 42:11 49:23 50:18 believe 6:8 9:6 13:17 21:12 25:8 33:20,20 34:3 39:22 44:19 52:18,23 believers 32:24 41:4 45:22 52:1 believes 25:7 33:17 belittle 28:13 belongs 25:8 benefit 45:5 better 44:19 49:19 54:8 bigots 59:17 bills 14:11 bishop 56:24 bishops 57:5 bit 38:21 41:11 blessed 4:2 block 31:20 board 7:7,8,8,15 14:17 23:9,17 25:4 30:5,25 31:8,9,22 36:20 41:23 43:5 50:11 51:1,1,2,2,7 56:18 boards 36:13 bodies 14:23,23 35:22 body 5:12,17 7:6 13:21 14:1,24 18:3 22:15 25:19 26:6,17 31:11,11 48:25 49:1 50:16</p>	<p>book 56:25 boundaries 39:5 boundary 40:8 41:1 bow 3:24 38:1,2 38:3 branch 42:14 branches 7:10 breyer 16:23 17:7,20 18:5 18:11,20 19:18 26:20 43:8,21 49:15,20 54:3 54:21 brief 7:5 14:4 15:9 26:5,7 27:17 28:20 52:22 58:19,19 bring 40:7,25 42:2,2 50:17 50:17 bringing 22:16 broad 37:10 broadly 34:19 brought 26:5,23 buddhists 32:14 46:10 burnings 48:11 business 60:15</p> <hr/> <p style="text-align: center;">C</p> <p>c 1:8,15,18 2:1 3:1 cable 16:16,21 30:7,8 california 28:2 call 7:17 41:12 46:15 called 3:20 4:6 23:2 candid 26:6 29:4 cant 20:23 21:9 41:15 42:20 43:18 44:10 47:18 52:19,25 53:7,8 56:16 56:18 59:24</p>	<p>carry 11:5 case 3:4,12 4:6,9 4:10,21 6:8,9 7:9,12 9:17,18 9:19 10:1,17 13:12 15:13 18:12 19:12,14 23:19 25:2 27:4,4 39:24 44:13 53:20 60:20,21 cases 13:10 14:16 52:4 categories 16:6 cater 47:16 catholic 48:10 censorship 52:9 52:11 century 48:10 certain 26:8 47:13 certainly 17:6,8 17:17 18:7 42:22 chairman 22:15 challenges 26:22 chambers 10:18 59:3 chance 44:21 changed 57:11 57:12 changes 40:6,23 channel 16:16 16:21 30:7,8 38:16 chaplain 6:6,10 9:22 12:17,18 25:25,25 28:1 29:5,17,17 54:25 56:23 chaplains 32:10 39:1,8 41:3 charlottesville 1:20 checks 26:8 chief 3:3,9,19 4:6 10:2 11:4</p>	<p>11:11 19:23 20:4 21:23 29:21,25 32:17 34:6,25 35:3 35:18 37:13,21 40:11 47:7 48:14,20 51:15 57:16,21 60:19 child 30:10 38:16 children 16:3 27:14,18 48:10 48:15,21 choice 57:4,4 christ 4:1 21:10 45:23 53:12 christian 17:23 20:9 24:25 38:8 46:5,6 54:17 56:8,10 christians 17:2 25:14 32:14 44:7 christs 34:12 church 48:11 57:6 circuit 16:25 28:11 39:25 40:13 52:3 54:15,18 circuits 20:6 40:14 circumstances 40:16 citizen 25:3 31:18 citizenry 42:25 citizens 24:21 37:18 38:2,3 41:24,25 42:2 42:2,4,12 43:3 45:3 50:16 city 11:21 35:11 45:11 citys 35:13 civic 35:10 48:3 civil 33:1</p>	<p>claim 16:5 claiming 59:2 clause 8:22 12:2 15:10,14 36:23 36:24,25 37:1 37:2,6,7,10,12 59:21,25 60:3 60:6 clauses 13:14 43:12 60:15 clear 11:16 12:19 39:7,12 40:12 clearer 40:17 clearly 4:19 6:22 9:8 12:1 15:18 31:11 51:4 52:5,5 54:20 58:4 clergy 35:8,11 35:12,15,19,24 36:10,15 41:7 48:3 55:7 client 49:3,5 clients 30:7 closer 5:10 9:16 closest 25:4 43:2 coerced 10:20 22:17 59:6 coerces 36:18,18 36:19 coercion 15:14 22:20 23:23 24:2,5 27:6,11 27:21 36:22,24 37:1,9,14 38:9 41:6,15,16 44:11 48:21 49:2 58:25 59:2,12 coercive 7:17 37:15,17 38:12 59:9 combined 54:22 come 14:17 18:19 36:3 45:3 52:5</p>
---	--	---	--	--

comes 32:5	25:22,23 26:13	57:22	d 1:8,15,18 3:1	desire 51:11
coming 7:20	31:13 41:24	correctly 3:11	damnation	detailed 55:7
44:3	43:1 45:19	couldnt 15:2	20:24 28:13	details 45:21
commits 31:20	49:15 55:23	council 15:23	damning 20:19	determination
committed 3:14	56:1,20 58:22	35:5,19	danger 12:9	34:7,8 35:9
committee 5:6	59:15 60:3,4	councils 22:21	dangerous 60:2	determinations
5:25 43:3	congressional	45:11 49:8	dangerously	35:4
committees 5:13	5:2,10 12:17	counsel 19:24	60:9	determine 20:7
common 56:25	12:18 21:18	29:21 51:12	day 5:25 6:1	20:23 21:3
commonly 52:3	consistent 13:13	58:6 60:19	dead 48:12	determining
communities	15:11	counselor 21:9	deal 59:13	21:5
53:11	constitution	count 34:13	dealings 10:23	devil 33:24 34:2
community 6:19	24:20 40:22	country 4:12	debate 59:15	34:3
18:4 25:3	50:5	24:19 43:12	debates 21:6,16	didnt 44:13,17
53:15	constitutional	46:3,9 48:2,7	21:19	difference 6:4
comparable	9:17,18,19,20	49:23 59:20	decent 49:9	10:3,6 25:18
8:12	11:3 12:24,25	county 15:12	decided 55:16	31:12 59:25
compelled 5:19	13:2,11,13,16	course 5:11 14:6	decides 51:2	differences 21:7
9:1 10:16	13:20 17:18,21	14:7 27:14,23	decision 16:21	22:25 23:25
competent 45:16	20:20 22:3	36:10	20:6	different 5:13
49:2	40:4,8 41:1	court 1:1,12	decisions 54:11	5:20 8:24 9:14
components	constitutionally	3:10,11,14,19	54:12	10:16 17:12
41:19	9:23 10:15	4:4 7:7 8:6 9:5	define 12:20	18:20,21 21:4
compose 46:15	18:8	10:25 12:13	36:16	23:19 25:20
comprehensive	content 9:25	14:17,25 16:25	degrees 37:18	38:21,22 42:25
39:1	28:10 29:18	20:5 21:20,20	deity 26:1 42:5	43:1,6,13 44:3
comprised 55:2	36:8,9 60:16	23:7 24:11,13	42:12,19,21	49:23 55:3
conceded 8:8	context 4:23 5:1	27:21 28:6	delegate 36:15	56:19
concern 15:14	8:10,11 21:23	30:1 37:10	deliver 28:2	differently
23:11	32:23 33:1	40:1 43:2	delivered 19:15	11:12
concerned 30:8	60:13	51:17 53:24,25	57:24 58:2	difficult 49:13
concerns 17:9	contexts 4:23	54:6,14 58:19	59:18	difficulty 52:4
concurring	continental	59:11	democracy	direct 31:15,17
55:10	25:22 59:15	courtroom 3:20	31:15,18	disagree 11:1
conduct 15:14	continued 38:16	5:1	denigrate 28:8	32:25 41:5
conducted 4:14	controversial	courts 12:2 13:9	28:18,24	45:22 52:1,3
confident 12:9	45:18 54:14	20:7,16	denomination	56:6 57:8
confirmation	convenes 13:23	creator 33:13	6:5,10 9:22	disagreed 45:24
5:3	conversation	46:25	29:17	48:9 56:12
conflict 60:14	36:6	crimes 31:20	denominations	disagreement
confused 26:11	conversion	criteria 26:24	6:6	16:20 17:8
congregation	28:12	cross 4:1,6 11:21	department	56:10
50:25	core 15:13 60:5	11:24	1:18	disagreements
congregations	corner 31:19	curiae 1:19 2:7	depend 4:23	57:11,13
57:5	correct 4:18 6:7	20:2	deputy 1:17	disagrees 11:2
congress 12:15	6:13,23 9:7		18:17	disapproval
14:2,10 15:1	43:20 56:3,24		described 9:14	52:10
		D		

disbelievers 45:24	51:13 52:1 53:7,22 54:9,9 54:14 57:9 60:12	entirely 30:3 41:15 52:20	examples 14:5 34:10	factors 23:14
disclaimers 41:9		entity 16:21	exclude 33:5 47:2	factual 57:22
disparaging 7:3		entrance 26:9	excluded 33:22 34:22 47:8,11 47:12,18,23	fair 29:4 55:24 55:24
disproportion... 45:7	doubt 48:24	environment 37:15	exclusion 15:17	faith 15:17 38:8 55:3
dissent 33:23 49:4 51:25	douglas 1:20 2:10 29:23	episcopal 56:23	exclusively 6:15 12:20 46:6 54:17	familiar 6:20
dissenters 32:23	downside 44:1	equal 24:21		family 31:19
distinction 8:9 8:20 10:12	dozens 44:2	equally 13:16 15:2,10 46:13 46:22,23		far 5:11 9:19 11:4 38:17
distinguishable 9:24	draw 4:1 52:19 52:25 53:7	equivalent 14:12 17:4 18:25 19:6	excuse 23:16	father 34:16,18
distinguishes 41:22	<hr/> E <hr/>	era 57:7	executive 7:6 31:23 42:14	fe 51:5
distinguishing 5:15	e 2:1 3:1,1	error 3:14	exercise 36:23 36:24 37:2,7	federal 14:9 20:16 22:24 59:24
distort 54:10	easier 6:8 27:4	esq 1:15,17,20 2:3,6,10,13	exercises 48:10	feel 17:23 22:17 52:23
district 21:20 40:6	easy 26:10 53:23	essence 15:4	existed 12:24	fellow 10:24
diverse 46:9	editing 36:8,9	essential 13:8	existing 40:22	felt 10:20,22 59:6
divine 22:23	effect 7:25	establish 13:15 60:4	exists 25:5	filed 58:11,20
doctrine 4:11 13:18 24:16	effort 17:22 18:13,22 54:23	establishment 8:22 12:1,8 15:10,14,15 36:25 37:1,6,9 37:12 59:21,25 60:3,6	exit 26:10	finally 59:22
doesnt 4:9 7:6 11:16,22 32:9 38:11 44:4,4 49:3 59:21	either 17:3 25:24 52:20	et 1:6	expect 59:12	find 49:22
doing 10:23 12:10 16:24 17:18,22 18:14 43:5 44:23 60:4	element 27:6	event 36:13	expected 11:1	first 3:4 8:4,7 11:13 12:6,12 12:15,15 14:4 20:11 24:10,11 25:22,23 32:9 36:6 38:24 45:2,19 55:23 56:1,2,23 57:22 59:16
dominated 45:6	elements 27:10 27:20	everybody 10:22 39:18 46:21,22 53:25	experts 42:13	five 41:13
dont 4:8 7:22 9:6 10:14 12:22 14:19 16:5 17:16 18:7,15 19:11 21:12 22:2,7,7 22:10 23:21 24:4 27:2 29:8 29:14 40:14 41:7,17 43:4 43:10 45:5,10 46:14,14 47:12 47:22 49:1,12	eliminated 41:15,18	everybodys 37:24	explanation 8:15 55:7	flawed 20:10
	eliminating 46:22	evidence 16:1	explicit 49:19	flipping 34:9
	elitist 56:14	ex 34:7	explicitly 32:24 56:8,9	floor 27:15 59:4
	elses 43:10	exact 4:25 5:8	explore 44:23	following 3:18 3:25
	enable 45:12	exactly 7:13 20:15 37:13,14 45:25 46:1 51:19	expressing 16:20	forbid 8:23,23
	enacting 42:7	example 21:17 27:13 32:13,13 32:15 33:3,6 33:10 38:20 46:19 57:7	expressly 59:11	force 15:6
	endorsement 3:15		extension 4:16	forced 25:6
	endorsements 37:11		extensive 58:21	formalistic 30:3
	ends 15:7 34:12		extent 26:23	formalized 31:14
	enforce 54:19		extreme 15:15	forth 49:17
	enforcing 52:8			forum 16:8 23:2 27:1 30:14,15
	engrafting 3:14			
	entertained 14:11			
	entertains 13:23			
	entire 60:5			

<p>31:7 59:19 foundations 4:12 founding 4:13 13:14 14:6 45:18 57:7,10 four 6:16 58:1 58:10 fourth 44:14 52:3 54:15,18 framing 12:12 free 36:23,24 37:2,7 front 3:20 5:5 full 24:21 32:22 function 50:10 50:15,21,22 functioning 56:19 functions 13:22 14:13 31:23 56:20 fund 14:4 fundamental 15:13 fundamentally 56:19 further 9:20 46:8 57:14 future 11:17</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g 1:15 2:3,13 3:1 3:7 57:19 galleries 27:18 galloway 1:6 3:5 general 1:17 22:21 generation 57:10 gershengorn 1:17 2:6 19:25 20:1,4,21 21:2 21:13,15 22:1 22:7,10,19 23:15,21 24:4 24:7,18 25:16</p>	<p>26:4,18 28:5 28:17,22 29:2 29:8,12 ginsburg 4:15 6:11,25 13:19 26:4 39:24 40:18,21,25 give 5:6 32:12 32:13,15 33:3 33:5,10 38:20 41:3 45:9,11 45:13 49:24 50:10 given 14:8 20:13 25:24 26:16 43:15 46:18 gives 51:2 giving 35:15 50:9 go 11:19,20 18:4 28:2 god 9:5,6 11:8 11:14 33:17,20 33:21 44:12 47:23 50:2,2,2 gods 33:21 47:22 goes 12:11 54:2 going 11:17,19 11:20 15:18 18:3 23:18 25:3 28:2,3 34:6 36:3 37:23 47:2 good 26:15 33:4 47:19 49:5 goodfaith 18:13 54:23 governing 48:25 57:6 government 7:11 14:6 15:16 24:24,24 25:5,13,19 36:8,12,14 41:9,10 45:16 50:9,10,15</p>	<p>52:19 54:13 55:13,15,18,22 57:10 59:24 60:16 governmental 42:7 50:21 51:4 52:12 governmentsp... 36:10 48:8 governor 46:25 gratuitous 41:16 great 46:23 greater 13:15,15 60:7 greece 1:3 3:5 7:15 14:14 17:10 38:23 48:4 49:8 56:16,18 58:1 ground 10:12 group 30:10 38:15 55:2 groups 33:7 42:16 44:2,3 46:16 47:1,6 guarantee 51:9 guest 25:25 35:23 guidance 19:9 22:23 24:9 guidelines 35:23 41:3 49:16 guy 22:14</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>h 1:17 2:6 20:1 hand 8:11 26:12 handle 20:17 hands 52:22 happened 18:9 18:17 harbors 26:21 hard 53:23,24 harmonious 54:6 harmoniously 43:14</p>	<p>hasnt 54:19 hate 45:10 havent 42:20 46:18 heads 3:24 38:1 38:3 hear 3:3 51:16 59:18 hearing 5:2,3,4 7:21 30:4,17 30:19,21 31:2 31:3 39:14 hearings 7:17,19 15:24 22:13 43:3 heavenly 34:16 34:18 heavily 52:9 55:13,16 held 3:11 7:18 7:19 10:25 21:21 22:14 29:15 39:15 51:4 help 41:9 47:18 55:6,8 helpful 26:25 heres 24:19 53:22 hes 10:25 19:18 high 27:15 hindus 32:15 44:8 46:10 historical 8:15 8:17 11:5,7 12:19 13:20 history 4:12 5:10,12 8:12 8:14,23 11:16 12:1,6,10 13:25 14:7,11 20:12 24:8,8 24:10,12 25:20 27:13 29:19 58:21 59:14 60:11 holy 21:19</p>	<p>home 30:10 38:15 honest 29:4 honestly 54:12 honor 4:8 6:3,7 8:3 9:7 13:1 14:3,21 15:8 15:25 16:10 18:1 21:2,13 22:1,8,19 23:1 23:11,22 24:5 26:18 28:5,23 29:2,8,20 30:19 33:9 47:4 58:9,12 honorable 9:5 hostile 54:1 house 35:22 54:25 55:1 houses 18:4 39:3 humankind 44:20 hungar 1:15 2:3 2:13 3:6,7,9,17 4:8,19 5:9,19 6:3,7,12,14,22 7:12 8:2,8,16 8:21 9:3,7,10 9:12 10:14 11:10,25 13:1 13:6,9 14:3,21 15:8,25 16:10 16:13,19 17:6 17:16 18:1,7 18:15,23,24 19:2,5,8,11,14 19:21 57:18,19 57:21 58:7,9 58:12,14,17 hybrid 13:21,25 26:6,16 hypothetical 8:5 9:13,13 10:4,7 12:5,11 hypotheticals 48:1 53:10</p>
--	--	---	--	---

<p>I</p> <p>ian 1:17 2:6 20:1</p> <p>id 19:21 22:19</p> <p>idea 59:9</p> <p>identical 37:7</p> <p>identified 3:13 23:24</p> <p>identifies 14:5 39:3</p> <p>identify 25:6 26:19</p> <p>idiom 20:14 25:24</p> <p>ill 34:25</p> <p>illequipped 20:16</p> <p>im 3:17 5:11 8:2 13:6 17:20 18:5 29:3,10 34:9,12,23 35:25,25 36:24 37:23 40:19 43:10 46:20 47:12,23 55:12 58:7,9</p> <p>immediate 30:12</p> <p>immediately 25:6 38:6</p> <p>immensely 55:6 55:8</p> <p>impact 13:15</p> <p>imply 32:22</p> <p>importance 37:18</p> <p>important 5:15 8:9 12:1 23:5 41:8 53:14</p> <p>impose 42:24</p> <p>imposed 48:9</p> <p>imposition 42:17</p> <p>impossible 34:20 38:13 44:20</p> <p>impression 49:5</p>	<p>include 18:13</p> <p>including 17:12 43:13 52:21</p> <p>inclusive 44:16</p> <p>incongruous 14:25 15:3</p> <p>inconsistent 25:12</p> <p>incredibly 53:14</p> <p>indicated 13:10</p> <p>indicates 15:13</p> <p>indication 10:10</p> <p>individual 15:20</p> <p>indoctrination 24:16</p> <p>inevitably 47:18</p> <p>inform 26:10</p> <p>infraction 40:4</p> <p>innocently 54:12</p> <p>inoffensive 43:24</p> <p>instance 8:1,2</p> <p>institution 25:5</p> <p>instruct 32:8,10 35:19</p> <p>instruction 35:16</p> <p>instructions 35:15</p> <p>interact 43:3</p> <p>interest 42:10</p> <p>interests 16:2</p> <p>introduced 53:6</p> <p>investigatory 5:4</p> <p>invited 10:8 20:8 50:25</p> <p>invites 20:15</p> <p>invocation 6:1 19:8 30:5 50:11</p> <p>invocations 19:15</p> <p>invoke 22:22 42:5,6,12,18 42:21</p> <p>invoked 26:1</p>	<p>invokes 21:10</p> <p>invoking 22:23 45:21</p> <p>involved 48:7 54:6 55:16</p> <p>involvement 55:18,22</p> <p>involves 4:19,21 4:21 52:9 55:13</p> <p>irritated 38:18</p> <p>isnt 16:8 26:13 53:10,18 56:24</p> <p>issue 3:12 7:14 9:25 16:16,18 35:23 45:3 50:14 53:19,21 56:11 59:16</p> <p>issues 23:10</p> <p>ive 39:19</p> <p>J</p> <p>jesus 4:1,3 21:10 53:12 56:5</p> <p>jew 6:1 24:25</p> <p>jewish 46:6</p> <p>jews 25:14 32:14 44:8</p> <p>job 42:3 59:5</p> <p>join 37:19 38:7 51:19,19</p> <p>joint 33:11 34:11</p> <p>judeochristian 33:2</p> <p>judge 20:24 40:6 44:2 45:16</p> <p>judges 42:1,13</p> <p>judgments 21:4 24:14</p> <p>judicial 8:10</p> <p>judiciary 8:24 8:25</p> <p>juniors 27:16</p> <p>jurisprudence 48:15</p> <p>justice 1:18 3:3</p>	<p>3:9,17,19 4:6 4:15,16,24 5:18,22,23 6:4 6:11,13,25 7:3 7:23,24 8:4,4 8:13,19 9:2,9 9:11 10:2,7 11:4,11 12:22 13:2,7,19 14:15 15:4,19 16:7,11,17,23 17:7,20 18:5 18:11,20,24 19:3,6,10,17 19:18,23 20:4 20:18,22 21:8 21:9,14,22,23 22:4,9,12 23:15 24:2,6 24:18 25:16 26:4,20 27:23 28:15,19,25 29:3,10,21,25 30:2,13,16,20 30:23 31:4,10 31:24 32:4,12 32:17,18 33:3 33:10,14,16,24 34:6,16,23,25 35:3,18,25 36:7,17,22 37:5,13,21 38:9,20 39:24 40:11,18,21,25 41:20 43:8,21 45:25 46:18 47:1,5,7,9,14 47:19 48:13,14 48:20 49:6,14 49:15,20 50:12 50:13 51:6,9 51:12,14,15,15 51:16 52:7,13 52:16 53:1,4,9 53:21 54:3,21 55:9,12,21 56:1,7,13,22</p>	<p>57:16,21 58:6 58:8,10,13,15 60:19</p> <p>justification 8:20</p> <p>K</p> <p>kagan 3:17 4:16 4:24 5:22 6:13 8:5 10:7 21:10 23:15 24:18 25:16 48:13 49:14 50:12 51:14 53:9,21</p> <p>kagans 7:3,24 30:2</p> <p>keep 32:10 43:23,24 54:25</p> <p>keeping 54:12</p> <p>kennedy 7:23 8:4,13,19 14:15 15:4 27:23 28:15,19 28:25 29:3,10 35:25 36:7 49:6 52:7,13 55:9,12 56:13</p> <p>kept 23:18 57:10</p> <p>kind 5:4 13:25 14:1 31:3 32:5 35:10,16,20 48:1 53:11</p> <p>kinds 4:25 21:6 21:16 35:23 41:22 43:16 49:22 50:23 54:2</p> <p>knew 6:20</p> <p>know 11:22 13:11 15:20 16:11 17:16 18:6,15 19:11 23:17,21 34:19 35:11 38:10 43:10 44:18 48:3 50:2,7 53:7</p>
---	--	--	--	---

<p>knowing 51:19</p> <p>known 32:24 41:5 52:1,3 57:8</p> <hr/> <p>L</p> <p>language 26:2 28:23 53:11,13 53:16</p> <p>laughter 19:13 19:20 32:20 34:1,5 35:2 55:11</p> <p>laws 42:8</p> <p>lawyerly 47:25</p> <p>lawyers 3:21</p> <p>laycock 1:20 2:10 29:22,23 29:25 30:15,18 30:22 31:2,6 31:17 32:2,7 32:21 33:8,11 33:15,19 34:2 34:9,18 35:8 35:21 36:5,9 36:19 37:3,8 37:17,25 38:12 39:20 40:9,15 40:19,24 41:2 41:20 42:20 43:20 45:1 46:17,20 47:3 47:11,17,21 48:17,23 49:11 49:18 50:7,12 50:24 51:8,14 51:24 52:11,18 53:3,6,9,19 54:9 55:6,15 55:24 56:3,9 56:17 57:3,17</p> <p>lays 53:24</p> <p>lead 5:25</p> <p>leads 15:15</p> <p>led 12:8</p> <p>lee 48:17</p> <p>left 18:12 35:14</p>	<p>legal 3:14</p> <p>legislation 31:21</p> <p>legislative 3:12 3:16 4:10,13 4:20,21,22 5:12,17 7:9,13 8:10 12:7,10 14:8,12,13,18 14:23,24,24 15:1 18:2,3 20:12 22:15 24:12 25:23 28:7 31:10,11 31:22 35:22 39:11 41:22 43:2,17 50:16 50:20,23 55:17 59:19 60:13</p> <p>legislator 10:24</p> <p>legislature 4:17 8:24 10:19 13:21 14:1 20:7 23:16 24:1,1 25:21 26:13 31:13 51:10 56:20 58:16</p> <p>legislatures 8:25 9:21 22:22,24 27:18</p> <p>level 14:9 60:2</p> <p>license 23:4</p> <p>light 29:19</p> <p>limit 28:7</p> <p>limitations 7:2,4</p> <p>limits 52:24</p> <p>line 9:19,20 14:22 51:20 58:5,18</p> <p>lines 52:19,25 53:7</p> <p>liquor 23:4</p> <p>listen 37:16</p> <p>listeners 56:6</p> <p>literally 46:21</p> <p>litigation 54:19</p> <p>little 38:21</p>	<p>49:18</p> <p>live 17:24 43:14</p> <p>local 25:3 45:7 59:23 60:2</p> <p>long 11:9 20:12 24:11 42:16 45:15 48:2</p> <p>longer 54:17</p> <p>look 11:11 21:3 34:10 36:4</p> <p>looking 29:18 39:2</p> <p>looks 24:11</p> <p>lord 4:3</p> <p>lot 31:20 38:22 46:9,10</p> <p>lots 17:11</p> <hr/> <p>M</p> <p>m 1:13 3:2 22:10 60:21</p> <p>madison 45:17</p> <p>mail 45:10</p> <p>maintain 54:5</p> <p>major 43:11 48:7</p> <p>majority 45:7 46:23 47:15 53:14</p> <p>making 17:22 18:13,21 38:25</p> <p>malice 6:18</p> <p>manage 55:19</p> <p>mandate 60:15</p> <p>manifestations 33:21 47:22</p> <p>manner 42:18</p> <p>margins 54:20</p> <p>marsh 3:13,15 4:11,19 6:9,9 9:21 10:17 12:14 14:19 15:1 20:15,19 24:9,10,15 28:7,17,23 29:9,15,15,16 32:21 55:17,21</p>	<p>55:25 59:2,3 59:10,11</p> <p>marshals 9:3</p> <p>matter 1:11 7:1 7:6 17:19 18:9 18:16 22:21 49:3 55:4 59:25 60:22</p> <p>matters 15:23</p> <p>mccreary 32:23 33:23 51:25</p> <p>meals 42:6</p> <p>mean 6:2,22 10:15,17 11:7 11:22 15:8 17:19 29:16 43:9 44:6,23 47:15 50:4 54:10 55:12</p> <p>means 11:18 24:23 55:8</p> <p>meant 29:9</p> <p>measure 40:3</p> <p>meet 58:16</p> <p>meeting 7:7 13:23 14:24 23:8 31:16 32:1 36:13 39:11 41:14 42:23</p> <p>meetings 7:14 23:9 32:6 45:4</p> <p>members 4:4 5:5 51:10,17 53:14 55:2</p> <p>mentioned 33:7 52:16</p> <p>mere 29:14</p> <p>mind 55:1</p> <p>mine 35:1</p> <p>minister 3:20,23 3:24 5:8 6:17 9:14 29:5 50:1</p> <p>ministers 6:21</p> <p>minorities 45:8 45:8</p> <p>minority 39:6</p>	<p>53:15</p> <p>minutes 7:20 41:13 57:18</p> <p>misimpression 57:23</p> <p>misrepresenting 52:17</p> <p>missing 41:21</p> <p>misunderstand 54:11</p> <p>misunderstood 9:13</p> <p>mitigates 23:22</p> <p>mob 48:11</p> <p>modest 49:9</p> <p>modified 28:16</p> <p>moment 19:17</p> <p>moments 38:14</p> <p>month 39:1 58:17</p> <p>morning 3:4</p> <p>motto 11:7,8,14 12:7</p> <p>multiple 16:15 19:15 45:13</p> <p>multireligious 54:5</p> <p>municipal 14:5 22:22</p> <p>municipalities 60:7</p> <p>municipality 59:23</p> <p>muslim 5:25 24:25</p> <p>muslims 32:14 44:8 46:10</p> <hr/> <p>N</p> <p>n 2:1,1 3:1</p> <p>name 34:12 50:3</p> <p>narrower 28:6</p> <p>nation 60:5</p> <p>nations 20:12</p> <p>nature 22:14 26:6,17 39:14 44:19</p>
--	--	--	--	---

near 17:10,24,24	45:15	39:7 55:17	particular 11:16	persuasive 27:9
nebraska 9:21	note 18:8	opening 20:12	28:14 31:3	petition 24:24
10:19 14:2	november 1:9	30:3	33:16 49:25	38:17
26:13	nuisance 31:19	opinion 15:12	50:1	petitioner 1:4,16
necessarily	number 13:22	16:25 17:21	particularly	1:19 2:4,8,14
11:25	34:10 47:20	43:10 55:10	36:2	3:8 20:3 57:20
necessary 26:16	numbers 44:7	opposed 16:22	parties 3:21	petitioners 30:2
40:7	45:8	opposite 17:22	21:17 39:25	petitions 30:11
need 36:23,25	<hr/> O <hr/>	oral 1:11 2:2,5,9	partisan 8:25	physically 38:1
40:23 52:24	o 2:1 3:1	3:7 29:23	pastor 46:21	41:7
55:7	oath 5:20 9:1	order 41:12,17	pastors 38:6	pick 47:1
needed 10:22,23	object 15:22	ordinances 42:8	peaceful 54:5	picked 47:3
needs 41:2	18:14	organized 18:22	peer 24:17	pieces 41:18
neutral 54:13	objecting 17:15	orthodox 6:1	people 5:19 6:19	pillars 24:9
never 31:25	objection 16:23	orthodoxy 60:17	9:1,6 10:8,16	place 7:4,4 32:9
new 1:3 3:15	17:5 18:6	ought 42:11	10:19,24 17:12	places 39:4
56:24	obviously 4:9	outlined 39:19	17:23 18:22	plaintiffs 15:20
newspaper	5:15 15:21	outside 39:4	22:5,17 25:8,9	play 52:13
18:18	occasion 16:13	overbroad 60:9	26:10 30:5,9	please 3:10 20:5
nice 13:5 26:14	occasional 35:12	<hr/> P <hr/>	31:7 36:19	30:1 38:6
night 45:4	occasionally	p 3:1	38:5,18 39:5	plenty 34:14
nightmare 44:5	16:8	page 2:2 34:10	41:7,23 42:5	point 10:4 17:8
nomination 5:7	occasions 6:16	pages 26:7 27:15	42:11 43:12	17:15 20:25
nonbeliever	16:15,15 19:16	58:20	44:11,13 45:12	22:20 26:24
25:1	59:9	paid 6:9	46:23 48:8,11	27:13 30:19
nonbelievers	occurred 5:24	papers 49:16	49:24 50:8,17	31:11 33:4,4
25:15 28:13	occurs 25:19	parallel 5:24	52:2 54:1,10	36:17 45:20,23
nonchristian	odds 60:10	13:4,7	54:11 56:15,17	56:5,10 58:19
57:23 58:1	offend 49:1	parents 30:10	58:10 59:8	pointed 23:1
nondenomina...	offensive 3:13	parse 20:22	percent 21:17	27:11,20
43:24	offer 38:7	parsing 20:15	21:18,18 45:22	points 27:17
nondiscrimin...	offered 57:6	21:1 24:14	percentplus	32:11,24 41:4
9:15	officer 35:5	part 6:18 15:24	46:4	51:25 52:2
nonlegislative	officers 16:3	16:8 27:5,24	perfectly 18:2	55:25 57:8
14:22	official 4:17	30:14,21 36:13	period 55:3	58:4
nonproselytizi...	25:25 35:19	39:11,13,21	permissible 4:7	police 16:3
49:10	36:1,12 57:25	50:14 54:4	9:23	policy 32:9
nonprovocative	oh 28:4	participants	permit 16:4	35:11 40:10
49:9	okay 9:9,11	17:25	52:20	41:3,3
nonpurely 14:13	11:17,23 34:3	participate	permitted 20:7	policymaking
nonreligious	47:14,19	37:19,22,23	person 5:5 19:15	31:21
19:15 44:18	once 58:17	38:1,13 41:7	50:19 51:3,3	political 45:9,12
nonsectarian	ones 6:15 23:3	participates	personal 30:6,11	polytheists
32:10 39:23	26:20 27:11,21	50:20	31:8 50:18,21	33:22 47:21
46:2 51:18,23	onethird 34:14	participating	51:10	population
52:6	open 6:6 9:15	10:10 38:5	personally 52:24	45:23 46:3
nonsectariani...			persuade 38:19	posed 10:7

position 6:25 15:11 17:17 18:16 27:2 49:7,7,10 52:14 58:24	46:2,16,22,24 48:2,3 49:4,25 50:20,23 51:2 51:7,10,23 52:15,20,21,23 52:24 53:1,2,5 53:7 57:1,7,24 58:22 59:18 60:2,16	30:11 pressure 24:17 45:12 pressures 48:19 preventive 60:5 priest 29:5 49:25 principal 24:8 principally 35:8 35:14 principle 45:21 57:12 principles 15:9 private 14:11 probably 34:4 47:23 problem 9:3 17:18,21 31:19 39:19 43:16 45:14 46:1 52:16 54:7 problematic 3:13 problems 55:19 procedures 31:14 proceeding 4:17 15:24 30:21 38:25 39:13 proceedings 15:21,22 39:10 process 9:15,15 produced 48:11 proffer 51:22 proffered 51:25 prohibit 52:20 prohibited 37:12 promises 24:20 24:20 promptly 7:24 proper 26:8,15 properly 11:6 proposal 11:13 30:24 31:3 proposals 31:8 propose 40:6	proposed 34:8 proposition 45:18 54:14 propriety 4:13 proselytize 28:8 28:16,18,20,23 28:24 proselytizing 7:2 20:19,24 21:3 36:2 protestant 45:23 46:4 48:9 protestants 56:12 57:8 protests 45:9 public 7:17,19 7:21 14:19 16:7 23:2 26:24 27:1 30:4,14,14,15 38:16 53:16 publicize 16:25 purpose 7:21 20:18 35:16 43:11,15 60:5 purposes 33:5 60:3 put 4:4 8:1 30:7 40:5 41:12 putting 15:16 18:21	29:10,12 31:8 56:13 quote 21:9 quoted 18:18
possibility 43:17 43:22 possible 39:22 43:25 46:15 possibly 59:24 practical 17:19 18:9,16 practice 3:16 9:21 10:18 11:16 12:7,17 12:24 13:5,7 13:11,20 14:8 18:3 38:21 40:7 59:5 practices 13:14 pray 36:11 38:10,11 42:22 51:4 prayer 3:16,24 4:11,13,20,21 4:22 6:24 7:9 7:10,12,20,22 8:5 10:11 12:7 12:11 14:6 16:14 17:3 18:3,19,25 19:7 20:13,13 20:15 21:3,23 21:25 23:8,9 23:18 24:12,14 28:3,11 29:18 30:12 32:1,8 32:10,13,15 33:6 34:8,11 35:10,17,20 36:1 37:16,19 38:7,7 39:10 39:18 41:11,12 41:12,17,22 42:21,25 43:4 43:16 44:17 45:4,9,11,13	prayergiver 26:2 51:1 prayergivers 20:9,14 57:24 58:2 prayers 3:12 6:14,21,23 9:24,25 12:19 15:2 20:8,23 21:18 25:24 28:7 33:8,12 33:12 35:6 36:8,10 39:23 45:20,20 48:8 49:8 50:9,23 52:10 54:16,17 54:20 55:17 56:4,25 58:2 praying 50:24 preach 28:12 precedents 12:2 13:9 precisely 51:8 predestination 56:4 predispositions 42:3 predominant 46:5 predominantly 46:5 preferable 44:24 preferred 51:22 presbyters 57:5 presence 27:14 29:14 present 4:9 33:5 presented 23:12	30:11 pressure 24:17 45:12 pressures 48:19 preventive 60:5 priest 29:5 49:25 principal 24:8 principally 35:8 35:14 principle 45:21 57:12 principles 15:9 private 14:11 probably 34:4 47:23 problem 9:3 17:18,21 31:19 39:19 43:16 45:14 46:1 52:16 54:7 problematic 3:13 problems 55:19 procedures 31:14 proceeding 4:17 15:24 30:21 38:25 39:13 proceedings 15:21,22 39:10 process 9:15,15 produced 48:11 proffer 51:22 proffered 51:25 prohibit 52:20 prohibited 37:12 promises 24:20 24:20 promptly 7:24 proper 26:8,15 properly 11:6 proposal 11:13 30:24 31:3 proposals 31:8 propose 40:6	proposed 34:8 proposition 45:18 54:14 propriety 4:13 proselytize 28:8 28:16,18,20,23 28:24 proselytizing 7:2 20:19,24 21:3 36:2 protestant 45:23 46:4 48:9 protestants 56:12 57:8 protests 45:9 public 7:17,19 7:21 14:19 16:7 23:2 26:24 27:1 30:4,14,14,15 38:16 53:16 publicize 16:25 purpose 7:21 20:18 35:16 43:11,15 60:5 purposes 33:5 60:3 put 4:4 8:1 30:7 40:5 41:12 putting 15:16 18:21	29:10,12 31:8 56:13 quote 21:9 quoted 18:18
			<hr/> Q <hr/>	<hr/> R <hr/>
			quakers 57:2 question 4:9,15 4:25 5:10,14 6:11 7:4,24 8:4 8:17,17,21 18:12 19:19 20:25 28:12 30:3 34:24 40:18 48:18 53:10,18,23 55:19 questions 57:14 quiet 49:9 quite 17:12 26:6	r 3:1 22:10 rabbi 29:6,13,15 raise 4:3 raised 4:3 23:12 59:16 range 57:13 ratemaking 14:17 ratified 12:16 rational 8:14 18:2 read 6:15,24 7:5 21:10 49:16 56:25 readily 8:6 ready 5:6,6 really 12:22 30:16 31:25 39:21 50:14 52:17,18 53:18 reasons 20:10 45:2,13 rebuttal 2:12 57:19 receive 35:15 recipients 16:3 recognize 4:13 22:25 26:12 recognizes 4:11 recommend 43:23 50:4 recommended 26:20 record 12:18,19 15:22 23:6,12 33:9 57:25 59:7 recruiting 39:1 refer 50:2 references 20:8 refers 53:12

reflect 60:11	representatives 11:4,11 19:23	6:4 9:2,9,11	separate 50:22
reflected 21:7	35:22 41:23	12:22 13:2,7	separated 23:6
regarded 11:6	55:1	18:24 19:3,6	31:4,7 48:15
regularly 26:1	republic 58:21	19:10,17 24:2	separating
regulating 60:16	requested 59:8	24:6 32:18	41:11
60:17	required 18:8	33:24 34:23	separation 27:4
rejected 59:11	27:3 59:3	36:17,22 37:5	27:8 30:4
relate 25:13	requires 20:6	38:9 41:20	39:12,20
relative 55:2	50:6	47:1,5,9,14,19	series 14:16 21:4
relevant 10:1	reserve 19:21	50:13 51:6,9	serious 42:7,9
relief 30:25	reserves 48:18	52:16 53:1,4	55:12
32:22 40:1,2	resistance 51:17	scheme 45:5,6	seriously 21:8
48:25	respect 12:4	school 7:7 27:15	session 3:19
religion 13:13	13:20 22:20	scope 36:16	7:10,13 9:4
13:16 15:16	26:19 27:1	seal 11:21,23	21:24 53:16
17:13 20:14,20	28:10 50:8	seated 10:9	sessions 20:12
27:25 28:3,9	55:23 58:25	38:11	43:17 55:17
29:7 33:1,17	59:14,22	second 20:6,14	set 32:25 49:15
39:6,8 43:12	respects 12:3	24:13 28:11	setting 26:9
43:13,13 50:1	14:4	39:25 40:13,14	shouldnt 52:15
54:1 55:14,16	respond 24:19	43:21	show 7:21 15:23
55:18,22 60:4	responded 4:5	secondly 12:10	52:22
60:15	respondents	14:10	shows 8:12 12:6
religions 17:12	1:21 2:11 7:16	sectarian 12:20	30:7 58:1,20
21:11 33:19	12:20 16:2	20:8 21:5,10	59:16
34:17 44:3	23:23 27:11,20	21:14,16,19,20	side 4:4 27:6
46:12 54:13,24	29:24 58:23	21:21 24:14	42:10 44:20
religious 17:2,4	60:10,14	29:18 32:8	sides 23:20,22
19:1,4 24:16	responsibility	36:2 37:11	sign 4:5
25:9,24 39:8	35:13	42:24 48:8	significant
42:9,11 45:8	responsive 25:4	51:18 52:5	10:15 12:3
45:17 48:9	restrictions 60:7	58:4,18,23	23:13,25 44:7
57:10,13 60:12	resurrection 4:2	secular 43:18	significantly
religiously 46:9	review 34:8 35:6	see 18:22 44:13	23:19
rely 4:20	reviewed 35:6	46:14	silently 42:22
remainder	revisit 11:20	seeing 21:16	similar 26:20
19:22	right 11:7,8,9	44:1	48:19
remaining 57:18	16:9 22:9	seeks 29:6	simply 8:14
remanded 39:25	28:11 32:12	selected 51:1	11:15 13:21
remedy 39:21,24	34:20 35:21	senate 27:14,15	35:15
41:19	37:3 41:10	56:23 58:19	single 29:16,17
repeat 34:23,25	43:21 44:9,14	59:4	29:17 45:3
repeatedly	44:17 47:8	senator 10:18	57:6 59:5
53:12	48:22	59:3	sir 11:10
reply 27:17	rise 10:5,8,8	senators 58:20	sit 21:25 22:2,5
representative	21:24	sending 12:15	22:8 37:15
50:16	roberts 3:3 10:2	sense 60:1,7	site 57:25

sitting 5:5 22:13 37:24 44:13 51:17 situation 5:21 40:22 skepticism 51:19 small 17:10 22:13 47:6 society 54:5 solemnizing 22:23 solicitor 1:17 solve 31:18,19 45:14 somebody 18:25 19:3 30:23 36:4 38:10 59:8 somewhat 31:6 sorry 8:2 34:12 34:23 36:25 58:7,9 sort 4:25 10:5 20:15 40:15 53:9 sorts 46:11,12 sotomayor 20:18,22 21:8 21:14,22 22:4 22:9,12 51:12 51:15,16 58:6 58:8,10,13,15 sought 20:16 sounded 6:14,21 6:23 sounds 56:13 source 55:18,22 55:23 speak 16:8 specific 30:6,24 specifically 30:25 spectators 3:22 spirit 21:20 spiritual 44:20 spoke 16:11,14	16:15 sponsored 36:14 squared 20:11 squarely 15:16 stand 3:23 10:16 10:19,20,22 22:18 36:20 38:1,15 45:11 48:25 59:5,8 59:18 standard 52:8,8 standing 16:2 started 23:17 starts 23:8 38:24 state 9:20 14:9 22:24 27:18 28:1 31:13 35:21 52:9 56:20 59:23 statements 4:25 states 1:1,12,19 2:7 9:5 12:16 15:2 20:2 41:11 44:12 50:6 stay 10:9 41:4 stayed 56:11 stays 38:11 stifle 42:18 stood 4:5 streets 48:12 strength 4:2 strikes 25:11 strongest 27:5 structure 39:9 subject 48:18,21 49:1 submit 21:5 submitted 60:20 60:22 subtle 48:21 suddenly 11:12 sufficient 55:5 suggest 47:15 60:1,6 suggested 16:24 39:22 52:8	54:3 suggests 41:9,10 59:7 suit 58:11 supervised 44:1 supervisor 18:18 support 5:7 supporting 1:19 2:8 20:3 suppose 3:18 4:24 6:13 19:17 54:21 supposed 25:4 35:4,5 supreme 1:1,12 14:17 sure 26:9 29:10 29:12 47:23 49:7 surprising 14:8 susan 1:6 susceptible 24:16 switch 23:20,22 syndrome 30:10 38:15 systematic 38:25 <hr/> T <hr/> t 2:1,1 table 5:5 take 11:21 32:21 43:9 talk 21:22 38:8 57:4 talking 14:13,23 22:5 40:12,19 43:11 tangible 37:22 task 36:15 42:7 team 25:9 tell 38:18 40:2 41:6 49:3 tendency 13:15 terms 14:12 test 3:15 24:3,5	24:6 27:24,24 28:6,25 34:19 36:23 37:6,7,9 37:14 51:22,24 51:25 testified 10:18 testify 5:6,20 9:1 testimony 5:7 38:2 texas 56:15 thank 3:9 19:23 29:20,21 57:16 57:21 60:18,19 thats 5:9,9 6:7,8 7:8,13,15 9:7,9 11:8,21 13:5 15:17 18:20,21 23:1,13 28:19 28:19,22,25 29:9,15 30:13 30:14,15,19,23 31:20,21 32:2 32:2,5,25 33:17 34:17,20 34:20,21 35:21 37:3,4 38:21 39:16,21 41:8 41:10 43:20,25 44:5,22 48:4 49:10,12 50:4 50:13,13,14,22 52:14 53:1,2,5 53:18,19,21 54:10 56:3 59:20 theologian 52:2 theological 60:17 theories 60:10 60:14 theory 40:21 thered 17:6 theres 8:14 16:1 16:1 20:23 30:20,20 36:24 37:1 39:12 44:9,10 48:2	48:24,24 theyre 17:4 26:21 29:11 34:4 37:20 41:24 50:9,14 50:15,24,24 theyve 11:18 54:16 thing 5:8 13:4 16:24 30:17,18 32:5 41:8 42:10 44:22 things 11:2,6 25:7 26:14,19 26:24,25 27:12 30:6 36:20 39:14 41:16 54:7 55:5 think 3:18 4:8 5:9 7:3 8:9 9:16 10:14 12:1 13:9 14:19 17:15 18:7 21:6 22:2 22:4,5,7,8,10 22:12,17 23:2 23:5,12,13,16 23:18,22,24 24:7,8,9,17,22 25:16 26:7,21 27:2,3,10,21 28:5,10 29:9 29:14 33:4,22 36:1 37:3 40:2 40:6,9,23,24 41:2,5,10,18 45:1,15 47:3 47:12,17 49:12 50:19,20 53:22 53:23,24 54:8 54:9,15 55:7 57:9 59:15 60:9 thinks 53:25 third 24:15 33:8 44:9 thomas 1:15 2:3
--	---	--	---	--

<p>2:13 3:7 57:19 thoroughly 17:1 thought 48:15 thoughts 49:23 threaten 28:13 threats 45:10 three 7:10 24:9 59:7 throw 32:18 time 8:22 9:25 11:9,13 12:14 17:25 19:22 23:6 30:4 31:5 31:7 36:11 39:12,21 41:11 48:6 51:3 54:6 56:11 57:1 59:6 times 59:8 today 11:13,23 13:4 28:3 44:2 44:17 57:13 58:22 told 10:8,9 48:4 tolerance 60:12 top 36:1 totality 40:16 town 1:3 3:4 7:7 7:15 13:23 14:14 15:23 17:10,24 18:17 22:21 23:17,25 24:1 26:11,23 27:8 30:5 31:12,16 32:1 32:6,8 35:5,19 38:22,24 39:3 39:4,5,11 40:9 41:2,5,23 43:5 44:6 49:7 50:11 53:16 54:22 57:25 towns 16:20 17:17 18:15 tradition 4:20 22:23 26:11 33:2 35:10</p>	<p>43:4,6,19 45:16 46:24 48:3 55:25 59:17,20 60:11 traditions 55:3 60:11 traffic 31:19 treat 46:20,21 46:23 treated 46:13 tried 10:21 40:15 trouble 27:12 44:25 troubles 25:2 true 33:21 47:21 47:21 54:10 59:1 trust 11:8,14 truth 45:17 truthfully 22:6 try 7:16 18:13 43:23,24 44:16 49:4 trying 38:18 54:4 turn 4:4 twice 48:17 two 7:2 12:2 14:3 16:14 20:10 41:18 45:3 54:22 55:5 twothirds 34:14 type 4:14 23:11 types 23:10 typically 38:6</p> <hr/> <p>U</p> <p>ultimately 52:13 unanimity 34:20 unconstitutio... 13:3 39:17 58:23 undergird 15:10 understand 7:1 10:4 12:22</p>	<p>14:19 47:22 understanding 25:12 56:22 understood 8:22 13:12 undertake 42:7 undertaking 50:15 undoubtedly 26:22 unfamiliar 45:8 unhappy 54:1 united 1:1,12,18 2:7 9:5 20:2 44:12 50:5 universe 46:25 unquestionably 59:1 upside 43:25 usable 30:9 use 28:15 38:16 49:11 utilities 7:8 utility 14:16</p> <hr/> <p>V</p> <p>v 1:5 3:5 48:17 variance 31:1 variances 39:14 various 6:6 14:5 54:2 vary 6:16 varying 37:18 vast 47:15 vastly 49:19 vehement 16:20 view 11:14 22:21 26:21 views 59:19 60:12 violate 37:2 45:21 59:21 violates 40:22 violation 7:25 8:1,7 11:3 20:20 35:12 violence 48:11</p>	<p>virginia 1:20 visible 38:6 visibly 49:3</p> <hr/> <p>W</p> <p>wake 30:12 walking 44:11 want 7:22 18:6 29:1 30:24,25 31:1 36:11 38:11 42:22 44:12 45:10 47:1 48:5 49:1 49:6 wary 24:13 washington 1:8 1:15,18 56:14 wasnt 17:9 way 3:13 11:15 15:5 22:20 36:11 37:22 39:1 42:22 44:23 48:7,22 54:6 56:13,19 57:5 ways 44:24 48:23 54:2 web 57:25 website 17:10 18:21 wed 49:18 wednesday 1:9 week 36:3 weisman 48:17 welcome 17:3 weve 15:5 39:21 40:15 42:24 47:7,11 48:1 48:14 whats 8:19,19 15:18 38:12 51:18 whos 22:14 28:2 wiccan 6:17 wiccans 32:15 wider 57:12 wilkinsons</p>	<p>20:24 willing 10:13 win 44:13 wisdom 19:9 wonder 11:4 49:21 wondering 3:17 wont 26:11 45:11 word 12:21 18:22 28:16 words 11:15 36:7 44:17 54:25 work 17:14 40:1 44:4,4 45:2 workable 54:16 works 39:21 world 21:11 46:25 worse 54:7,15 worship 18:4 24:21 39:3,4 worshippers 33:25 34:2 wouldnt 7:1 11:11 22:17 37:2 49:11 57:3 write 55:9 writing 12:15</p> <hr/> <p>X</p> <p>x 1:2,7</p> <hr/> <p>Y</p> <p>yeah 47:9 year 6:15 58:8 58:13 years 6:10,14 9:22 25:19 48:2 york 1:3 56:24 youll 38:22 44:21 youre 10:13 14:13 18:13</p>
---	--	--	--	--

21:16 22:16	4			
29:12 41:21				
youve 49:16	5			
Z	50 21:17			
zoning 7:8 13:24	57 2:14			
0	6			
00 23:8	6 1:9 23:8,10,10			
04 1:13 3:2	60 21:18 44:2			
60:21	7			
1	70 44:2			
1 47:20	74a 34:11,16			
10 1:13 3:2 58:2	8			
11 6:14 58:3	8 58:20			
60:21	9			
1120 23:7	929 23:7			
121 59:8	98 46:4			
12696 1:4 3:4	981 45:22			
13 34:11 58:3				
15 21:17				
16 6:10 9:22				
17 58:20				
1800 11:22				
19th 48:10				
2				
2 45:22				
20 2:8				
200 48:2				
2003 34:12				
2007 18:10				
2008 57:24				
2009 58:2				
200year 35:10				
2013 1:9				
22 26:7				
24 26:7				
240 25:19				
29 2:11				
3				
3 2:4 57:18				
30 7:20 23:10				
32 23:10				
37 35:21				